Judicial Politics in the Privy Council: A Legal Analysis of Its Impact on the Constitutionality of the Death Penalty in the Commonwealth Caribbean

By

Vincel Anthony Edwards LLB, LLM & MBA.

A thesis submitted in partial fulfilment of the requirement of the University of Wolverhampton for the award of the degree of Doctor of Philosophy

August 2021.

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Signature Sgd. Vincel Anthony Edwards.

Date…..…30th..... August.…….2021.

Abstract

An institution such as the Privy Council is the supreme judicial body for some Commonwealth countries. The main objective of this research is to understand the extent to which the Privy Council decision making on the constitutionality of the death penalty in the Commonwealth Caribbean influenced by judicial politics. This issue is extant to the Commonwealth Caribbean society and therefore a legal analysis of it is necessary to generate new insights into the judicial politics of the Privy Council. Therefore, the decision making on the constitutionality of the death penalty is the vehicle used in this research to present explanations in response to this issue. This is demonstrated through the theories of judicial behaviour in the perspectives of the legal model, the institutional model and the attitudinal model of such behaviour. It worth noting that in some Commonwealth Caribbean States the death penalty is the punishment prescribed by law for persons guilty of the crime of murder. However, there are serious concerns with the application of this punishment. A case law analysis of the death penalty in the Commonwealth Caribbean from a policy perspective will be pursued. Also, of major concerns in this regard is that it is hypothesized that the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by judicial politics. This research will focus on exploring, evaluating and explaining the hypothesis on the death penalty in the area of judicial politics. It involves examining the structure, nature and the relationship between the concept of judicial politics and that of the constitutionality of the death penalty. Wider issues such as an analysis of judicial reasoning by the Privy Council involving the death penalty and also human rights issues have been pursued. Thus this research also necessitates assessing the jurisdiction and jurisprudence of the Privy Council and the Caribbean Court of Justice in evaluating the judicial attitude towards the issue of cruelty of the death penalty in the Commonwealth Caribbean.

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Acknowledgements

In the Authorised King James Version of The Holy Bible, it is stated that, *"I can do all things through Christ which strengtheneth me"* (Philippians 4:13). In furtherance of this statement Jesus Christ in the gospel of St. Matthew prophesied by saying; *"With men this is impossible; but with God all things are possible"* (Matthew 19:26). These inspirational words are really the words of wisdom which have been the catalyst or driving force in this my academic achievement. I therefore hail praises and thanks to my Lord and Saviour Jesus Christ for his strength in guiding me through my programme of study. I also must thank my God for making this academic achievement possible.

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CHAPTER ONE

INTRODUCTION AND RESEARCH PURPOSE

1.1: Background of Study

Law as a subspecies of politics. The purpose of this research is to conduct a contemporary legal analysis of judicial politics in the Privy Council in order to further understand and explain the death penalty in the Commonwealth Caribbean. This would be necessary to adequately theorise some identifiable statements on the death penalty which are in the public domain.[1] It was Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit who said: *"judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."*[2]

Bearing this quotation in mind then this research presents a case law analysis on the of the death penalty in the Commonwealth Caribbean along with a legal and textual analysis of the decision making on the constitutionality of the death penalty by the Judicial Committee of the Privy Council *[hereinafter called "the Privy Council"]*.[3]

Therefore, the objective is to investigate the extent to which the decisions in the Commonwealth constitutional appeals impact on the death penalty in the

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[1] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79: *Riley and Others v Attorney General* [1982] 35 WIR 279, PC: *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[2] Harry T. Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) University of Pennsylvania Law Review 151 (5) 1639 – 1690 at 1645.

[3] Thomas Mohr, *A British Empire Court – A Brief Appraisal of the History of the Judicial Committee of the Privy Council* (Irish Academic Press, Dublin Ireland 2011) 125.

Commonwealth Caribbean. Judicial decision making is an important area of this research as it speaks to the components of the decision that influence a judge‘s ruling in constitutional matters as well as to the larger impact that those rulings have on the history of the Commonwealth Caribbean society. It is worth noting that those decisions would have an enduring impact on the Commonwealth Caribbean society long after the judges have left the bench. Further, the justices of the Privy Council have the task of deciding some of the most controversial death penalty issues in the Commonwealth Caribbean society.

One of the goals of this thesis is to analyse the judicial decision making of the Privy Council on the constitutionality of the death penalty in the region and to present the impact that those decisions have on our society. A research of this nature will demonstrate a legal and textual analysis on the judicial behavior of judges in terms of what judges do as judges and in this particular case the concept of judicial decision making policy. *Kouroutakis* research suggested that judge's intervention into judicial decision making policy demonstrates either the concept of judicialization of politics, or judicial activism, or judicial policymaking.[4] In this particular instance it entails an analysis of the category of judicial behavior known as judicial politics that is reflective of the law versus social and public policies.[5]

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[4] Antonios E Kouroutakis, 'Judges and Policy Making Authority in the United States and the European Union' (2014) 8 (2) International Constitutional Law Journal 186 – 200 at 187.

[5] Lawrence Baum, *The Puzzle of Judicial Behavior* (The University of Michigan Press Ann Arbor 2005) 1 – 230 at 1 - 22.

Legal doctrine of judicial politics. The objective of this research is to present an understanding of the legal doctrine of judicial politics in the Privy Council through the issue of the constitutionality of death penalty in the Commonwealth Caribbean. *Ely, Vinz, Downing, and Anzul* indicated that researchers need to understand the meaning of words and or phrases for themselves before directing them to others.[6]

It is in this regard the term *'judicial politics'* which is used in this research has been described as the sensitizing concept ascribed to the current theories and approaches of the Privy Council in addressing issues pertaining to the death penalty. It is the kind of judicial behaviour which embraces the choices that justices make in judicial decision making.[7] *Joondeph* described politics which is applicable to the court to be synonymous to judicial discretion if they are not strictly dictated by the accepted sources of legal authority.[8]

In addition, *Tamanaha's,* writing ascribes five meaning to judicial politics to wit law as a subspecies of politics, politics as producing public policy, politics as ideology,

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[6] Margot Ely, Ruth Vinz, Maryann Downing, and Margaret Anzul, *On Writing Qualitative Research Living by Words* (The Falmer Press 2004) 19.

[7] Frank B. Cross, 'The Justices of Strategy' (1998) 48 Duke Law Journal 511 – 570.

[8] Bradley W. Joondeph, 'The Many Meanings of "Politics" In Judicial Decision Making' (2008) 77 (2) University of Missouri-Kansas City Law Review 347 – 380 at 349 said: ("Perhaps the broadest conception of "politics" as it applies to courts is as a synonym for judicial discretion. On this reading, judicial decisions are political if they are not strictly dictated by the accepted sources of legal authority, such as the relevant text, history, tradition, or precedent. That is, when a judge exercises personal judgment, she has resorted to criteria outside the law and thus rendered a decision that is necessarily political.").

politics in controversial issues and politics in judicial appointments. However, he made it clear in the said article that such meanings are not exhaustive.[9]

Moreover, this research on judicial politics will focus on *Tamanaha's* first description of judicial politics that is law as a subspecies of politics. This would be on the basis upon which judges construct their decisions and in this instance on the constitutionality of the death penalty.[10] *Cross* on the other hand suggested that the oversimplification of judicial behaviour does not really capture the reality of judicial decision-making.[11] In this regard the operational description herein for *judicial politics,* as it relates to the death penalty, is understood from *Tamanaha's,* writing is a judicial process that produces public-policy decisions.[12] In effect judicial politics as presented in this research depicts such decisions which are judicially contrived by the Privy Council that impacts on the Commonwealth Caribbean Society.

In this research, what is considered to be judicially contrived by the Privy Council, is presented as a general theory of judicial behaviour which resulted in the lack of certainty of the death penalty by that institution. This research will also be reflective of the inconsistency in the area of sentencing and more so in the application of the

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[9] Brian Z. Tamanaha, 'The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" is not Partisanship' (2012) 61 (759) Emory Law Journal 760.

[10] Ibid.

[11] Frank B. Cross, 'The Justices of Strategy' (1998) 48 Duke Law Journal 511 – 570 at 538.

[12] Brian Z. Tamanaha, 'The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" is not Partisanship' (2012) 61 (759) Emory Law Journal 760.

death penalty as a punishment. Thus, it will be demonstrated in this research that the concept of judicial politics offends against the principle of equality before the law and certainty of the rule of law. This position was also articulated by *Bagaric* who suggests that the law must be certain and therefore the legal standards must be declared in advance to the legal situation.[13]

It is proposed that this research will demonstrate the inconsistency that judicial politics presents in matters of the constitutionality of the death penalty.[14] The decision in the *Pratt's* case[15] is evidence of this and the focus of this research is to present the theory of judicial behaviour to explain how the judges of the Privy Council use the legal doctrine of judicial politics to get what they want as it relates to the law.[16] In this regard *Dworkin* indicated the varying nature of judicial decision making particularly in the areas of constitutional matters when he said that judges must sometimes make new law, either covertly or explicitly.[17]

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[13] Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing Limited 2001) 19 suggests that ("Just as consistency in punishment – a reflection of the notion of equal justice is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as the badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.").

[14] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[15] *Ibid*.

[16] Arthur Dyeve, 'Unifying the field of comparative judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 (2) European Political Science Review 297 – 327.

[17] Ronald Dworkin, 'Hard Cases' (1975) 88 (6) Harvard Law Review, 1057 – 1109 at 1058 indicated that: ("Theories of adjudication have become more sophisticated, but the most popular theories still put judging in the shade of legislation. …. Judges should apply the law that other institutions have made; they should not make new law. That is the ideal, but for different reasons it cannot be realized fully in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly.").

On the other hand *Rosenberg* subscribes to *Dahl's* views on the political nature of judicial decision making by saying that decision making by the court was political as well as legal.[18] This view has placed in context the nature of this study of the decision making of the Privy Council. This research exploration embraces a legal analysis, evaluation and explanation into the legal doctrine of Judicial Politics' inherent in the Privy Council that impacts on the constitutionality of the death penalty in the Commonwealth Caribbean.

It is a doctrinal-politics approach which embodies a close association between the analysis of judicial politics and the practices of the Privy Council as a judicial institution. This research also entails a presentation of a logical but objective explanation of the Privy Council's decision making models on the constitutionality of the death penalty which has engulfed the concept of judicial politics.[19]

The death penalty remains the lawful punishment in some of the Commonwealth Caribbean States for people convicted of murder and as such it is essential that one has a proper grasp of this penalty from a Commonwealth Caribbean perspective.[20] It

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[18] Gerald Rosenberg, 'The Road Taken: Robert A. Dahl's Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (2001) Emory Law Journal 613 – 630 at 625.

[19] Ibid.

[20] Shantel A. McDonald, 'A True Sense of Independence: The Abolishment of United Kingdom's Influence Towards the Legal Affairs of The Commonwealth Caribbean' (2015) 22 (1) ILSA Journal of International Law 133 – 159.

should be noted that the Commonwealth Caribbean region is made up of twelve independent countries and six British dependent territories.[21]

Those independent countries are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago[22] whereas the British dependent countries are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands.[23] It is proposed that the geographical frame for this research revolves only around twelve independent Commonwealth Caribbean countries that have the death penalty as the punishment for the crime of murder.[24]

Moreover, an acquaintance with this research topic is of utmost practical importance since it entails a general scope of the death penalty in States in the Commonwealth Caribbean region. This would be from a legislative and also a jurisprudential standpoint. An understanding of both areas is necessary since it would demonstrate the concept of judicial politics which is entangled in judicial reasoning on constitutional issues pertaining to the death penalty at the level of the Privy Council.[25]

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[21] Jacqueline Anne Braveboy-Wagner, English - speaking Caribbean' ... Companion to World Politics (Oxford University Press 1993) 265.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Shantel A. McDonald, 'A True Sense of Independence: The Abolishment of United Kingdom's Influence Towards the Legal Affairs of The Commonwealth Caribbean (2015) 22 (1) ILSA Journal of International Law 133 – 159.

From the research standpoint it is proposed to pursue a legal analysis of constitutional decisions of the Privy Council. This is necessary to investigate the extent to which judicial politics impacts on the death penalty as a punishment. In this regard *Webber* suggested that the ordinary practice in a research of such a nature would be to explain or predict Supreme Court rulings based on the ideology of the justices.[26]

It is for this reason that this proposed research necessitates adopting an interpretive model of constitutional documents whereby a number of judicial decisions for the period 1975 to 2009 relating to the constitutionality of the death penalty would be reviewed, analysed and evaluated. This period is significant to this research since there are several constitutional decisions available which impact on the Commonwealth Caribbean's public policy on the death penalty. In this regard *Tittemore* credited the role attorneys played which resulted in a series of Privy Council decisions that had a profound impact upon the standards and procedures for applying the death penalty.[27]

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[26] Kate Webber, 'It is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII (2016) 89 (2) St. John's Law Review 841 – 881 at 851.

[27] Brian D. Tittemore, 'The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections' (2004) William and Mary Bill of Rights Journal 445 – 520 at 465 credited: ("The efforts of the London attorneys resulted in a series of Judicial Committee of the Privy Council decisions that had a profound impact upon the standards and procedures for applying the death penalty in the region, including the role of international human rights instruments and supervisory bodies.").

Moreover, *Kastellec and Lax* emphasised that justices used case selection to develop particular legal doctrines.[28] Therefore, it is worth noting that the Commonwealth constitutional appeals decided by the Privy Council are the vehicles which convey this research. These decisions are notable for their statements which poised to develop on issues surrounding the constitutionality of the death penalty as a punishment in the Commonwealth Caribbean. In addition, some of the decided cases which revolved around human rights issues, affect the legitimacy of the constitutionality of the death penalty.[29]

Of practical significance to this research is the opinion in *Pratt and Another v. Attorney General for Jamaica and Another*.[30] This case has been a landmark one with regard to the principle on the delay in the carrying out of the death penalty in the Commonwealth Caribbean. This decision has reshaped the application of the death penalty in the region and it also opened up the justice system for other significant constitutional challenges to the death penalty.[31]

On the issue whether the law influences the choices that Supreme Court justices make *Tarr* suggested that a nonlegal factor—namely, the political and social attitudes of the

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[28] Jonathan P. Kastellec, and Jeffery R. Lax, 'Case Selection and the Study of Judicial Politics' (2008) Journal of Empirical Legal Studies 407 – 446 at 408.

[29] Ibid.

[30] *Pratt and Another v. Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[31] Brian D. Tittemore, 'The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections' (2004) William and Mary Bill of Rights Journal 445 – 520.

justices themselves—could have played a part in the judicial process and judicial policymaking.[32] In addition, *Black and Owens* also indicated that it has become unquestionable among judicial politics scholars that justices are motivated primarily by their own policy goals.*[33]* This would suggest that there are different theories of judicial behaviour that have been developed and shaped decisions making in the Supreme Court.[34]

In this research, it is proposed to focus on three theories of judicial behaviour to explain the how and the why the Justices of the Privy Council decide Commonwealth constitutional appeal cases on the death penalty in a certain way. In terms of the court's decision, *Young,* in his research on the death penalty in the Commonwealth Caribbean, indicated that courts that are viewed as more conservative tend to look more favourably on the death penalty, while on the other hand courts that are more liberal tend to be less likely to support it.[35]

Young also said that the ideological factors refer to the judge's place on the liberal-conservative continuum whereas the legal factors refer to the influence of statute law

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[32] G. Alan Tarr, *Judicial Process and Judicial Policymaking* (5th edn. Wadsworth Cengage Learning 2010) 228.

[33] Ryan C. Black and Ryan J. Owens, 'Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence (2009) 71(3) The Journal of Politics 1062 – 1075 at 1062.

[34] Ibid.

[35] Harold Young, 'The Death Penalty: The Law Lords Alter Course in the Commonwealth Caribbean' (2017) 10 (2) Journal of International and Global Studies 64 – 85 at 78.

that underpins the decisions of the court.[36] Paramount to this research would be the focus on those factors illustrated by *Young* in terms of the legal, institutional and attitudinal models. They will be explored to explain the ideological policy goals of Justices of the Privy Council in deciding Commonwealth constitutional appeal cases on the death penalty.

Legal model. In essence the legal model refers to traditional interpretive approaches of judicial decision making. In essence this model can be considered as a predictor of judicial behaviour since it is based on the original intent approach. *Brennan, Epstein and Staudt* writing on the subject of the 'Macrotheory of the Court' describe the legal model approach by saying that the judges are neutral deciders who approach their decision by looking at existing legal tenets and doctrine.[37]

In this regard with the legal model, a judge will apply his legal training and knowledge to the facts at hand and decide the matter in an objective legal manner. In presenting the Austrian perspective on judicial decision making, *Holbrook* said that the legal model posits that judicial decisions are based on the facts of the case and the rule of law.[38] This therefore means that the application of this model does not include a

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[36] Harold Young, 'The Death Penalty: The Law Lords Alter Course in the Commonwealth Caribbean' (2017) 10 (2) Journal of International and Global Studies 64 – 85 at 70.

[37] Thomas Brennan, Lee Epstein and Nancy Staudt, 'Economic Trend and Judicial Outcomes: Macrotheory of the Court' (2009) 58 Duke Law Journal 1191 – 1230 at 1204 said: ("Legal approaches suggest that the Justices rendering opinions in cases and controversies privilege existing legal tenets and doctrine: they are neutral deciders who look to the … Constitution, statutes, judicial precedent, and various other legally relevant materials to maximize the correctness of answers to the legal issues presented.").

[38] Christopher M. Holbrook, *Judicial Decision-Making: An Austrian Perspective* (University of Missouri, Department of Political Science, 2011) 1 – 20 at 2.

judge's personal preferences but is an indication of the judges setting aside their views in order to create a rational and efficient system for the greater good of the society.

George and Epstein describe the legal model in terms of judicial decision making based on past cases.[39] Take for instance the *De Freitas v. Benny* case which not only epitomises the legal model of judicial behaviour but it is also a symbol of the retributive theory of punishment. In that case the Privy Council applied the law to the facts of the case to formulate the precedent that is binding on the issue of delay in carrying out the death penalty.[40]

Eskridge described the legal model alternatively as the rule of law model. In defining this model he further said that judges should strive to interpret case facts correctly, adhere to applicable precedent and apply statutory texts faithfully.[41] It is worth noting that some judges of the Privy Council such as Lords Morris, Diplock, Dilhorne, Kilbrandon and Salmon for their judgement in the *De Freitas* case[42] were considered to be strong interpreters of the rule of law on the death penalty.

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[39] Tracey E. George, and Lee Epstein, 'On the Nature of Supreme Court Decision Making' (1992) American Political Science Review 323 – 337 at 324 indicated that: ("At its core, legalism centers around a rather simple assumption about judicial decision making, namely, that legal doctrine, generated by past cases, is the primary determinant of extant case outcomes.").

[40] *De Freitas v. Benny* [1975] 27 WIR 318, PC.

[41] William N Eskridge, Jr. Chevron as a Canon, 'Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases' (2010) 110 Columbia Law Review 1727 – 1816.

[42] *De Freitas v Benny* [1975] 27 WIR 318, PC.

Of noteworthy importance and a reflection of the legal model is the case *Riley and Others v Attorney-General of Jamaica and Another*[43] the precedent case to the *Pratt* case.[44] There are also other cases of noteworthy importance which followed *Pratt's* case.[45] Some of those cases endorsed the principle stated in the *Pratt* case[46] that allows the convicted murderer to have his sentence commuted to life imprisonment. Thus, it is important to determine from a Commonwealth Caribbean perspective, the rationale for the Privy Council decisions in terms of the constitutionality of the death penalty. In this research the rationale is described as judicial politics which is the legal doctrine researched herein and with a focus on judicial behaviour.

Institutional model. The institutionalist model highlights the impact of policies and procedures of the courts. In effect this model emphasizes a broad institutional context in which courts and judges operate. It ensures that judicial bodies do not operate in a vacuum. *Gillman and Clayton* indicated that judges in pursuing their policy goals, are often severely constrained by their institutional environment.[47] Therefore, within this environment are precedents which are case laws.[48]

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[43] *Riley and Others v Attorney-General of Jamaica and Another* [1982] 35 WIR 279, PC.

[44] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[45] *Ibid.*

[46] *Ibid.*

[47] Howard Gillman and C.W. Clayton, *Supreme Court Decision-making – New Institutionalist Approaches* (Chicago University Press1999) 1–12.

[48] Ibid.

The institutional model of judicial behaviour symbolised the concept of following precedent whose principle demonstrates that like cases should be treated alike.[49] This model draws its strength heavily on the insights of the rational choice theory. *Lovett* described this theory as a set of tools that sometimes help social scientists in their efforts to understand and explain social phenomena.[50] Therefore, its principle can affect decision making in a particular way.[51]

Some judges of the Privy Council such as Lords Edmund-Davis and Fraser for their judgement in the *Abbott case;*[52] Lords Bridge and Hailsham for their judgement in the *Riley* case[53] and Lord Hoffman for his dissenting judgement in the *Lewis* case[54] were considered to be conservative justices since they were strong followers of precedents. The judicial rulings of these judges have given the indication that they were strong followers of the institutional model towards the death penalty. In this regard their judicial behaviour suggests that they were guided by the institutional concept of the

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[49] Harry T. Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 (5) University of Pennsylvania Law Review 1639 – 1690.

[50] Frank Lovett, *Rational Choice Theory and Explanation* (18 (2) Rationality and Society, Sage Publications, 2006) 237–272 at 265.

[51] Lewis A. Kornhauser, 'Appeal and Supreme Courts' (1999a) New York University School of Law 45 – 62.

[52] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[53] *Riley and Others v Attorney-General of Jamaica and Another* [1982] 35 WIR 279, PC.

[54] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

rule of law since they used established rules in previous court cases as the basis for their judicial decisions.[55]

For instance, Lord Hoffman in the *Lewis* case was very critical of this approach by the Privy Council and suggested that there was no justification to depart from the precedent.[56] On the one hand this approach of the justices explains the judicial process of interpretation and application of the Constitution where the members of the Privy Council, in death penalty matters, produce decisions which are judicially contrived. On the other hand, this statement is a clear endorsement by Lord Hoffman of the institutional model of following precedent.

Attitudinal model. The Attitudinal model defines the behaviour of Supreme Court justices which in some contexts directly reflects their attitudes toward policy issues.[57] Scholars are of the opinion that judges behave attitudinally when they make decisions based on policy preferences or political ideology. In a research on interpreting judicial behaviour, *Ryan* indicated that an attitudinalist behaves opposite to a judge who adheres to the legal model which means that they will not follow precedent.[58]

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[55] Jack Knight and Lee Epstein, 'The Norm of Stare Decisis' (1996) 40 (4) American Journal of Political Science 1020.

[56] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC Lord Hoffman said: ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently,' the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

[57] Lawrence Baum, *The Puzzle of Judicial Behavior* (The University of Michigan Press *Ann Arbor* 2005) 1 – 230 at 6.

[58] Megan Ryan, Interpreting Judicial Behaviour: How Content Analysis of Language Reveals the Values, Philosophy, and Judicial Decision Making Style of William H. Rehnquist (University of Arkansas, Fayetteville, 2012) 1 – 109 at 96 indicated ("An attitudinalist will behave in the opposite

The attitudinal model is essentially the political version of decision making, where judges decide disputes in light of the ideological attitudes and values of the justices. *Brennan, Epstein and Staudt,* writing on the subject the 'Macrotheory of the Court,' also identified with this model within the terms of the political model of decision-making and demonstrated the Justices' political preferences.[59] The ideological viewpoint referred by *Brennan, Epstein and Staudt* is synonymous with the concept of the attitudinal model.

Accordingly, *Yates and Coggins* postulated that the attitudinal model suggests that judicial outcomes are driven by judges' sincere policy preferences.[60] This therefore means that an essential role of the judiciary and in particular courts of last resort depend to some extent on the individual attitudes and values of the policy preferences of the justices who are the office holders of the court of last resort.[61] Such an idea was

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way of a judge who follows the legal model. Meaning they will not follow precedent or legal tradition and they will make rulings that are more activist in nature because they will not restrain themselves by looking for the legislative intent.").

[59] Thomas Brennan, Lee Epstein and Nancy Staudt, 'Economic Trend and Judicial Outcomes: Macrotheory of the Court' (2009) 58 Duke Law Journal 1191 – 1230 at 1204 – 1205 said: ("Political theories of decision making, by contrast, assume that the Justices have political preferences that they seek to embed in their opinions. The political theory does not ignore precedent or law-related factors but views the development of doctrine as a way to implement partisan and ideological viewpoints and to keep lower courts judges in line.").

[60] Jeff Yates and Elizabeth Coggins, 'The Intersection of Judicial Attitudes and Litigant Selection Theories; Explaining U.S. Supreme Court Decision-Making' (2009) 29 (263) Journal of Law and Policy 263 – 299 at 263 postulated that: ("In political science, the Attitudinal Model suggests that judicial outcomes are driven by judges' sincere policy preferences—judges bring their ideological inclinations to the decision-making process, and their case outcome choices largely reflect these policy preferences.").

[61] Sebastien Jodoin, 'Understanding the Behaviour of International Courts An Examination of Decision-Making at the ad hoc International Criminal Tribunals' (2010) Journal of International Law and International Relations 1 – 34 at 6.

well captured in a different jurisdiction by Justice Dickson in the Supreme Court of Canada. In the case *Hunter v. Southam, Inc.*[62] he referred to the Constitution as a living thing which the judiciary must consider in interpreting its provisions.[63]

Moreover, *Baum and Devins* described the role of justices of the Supreme Court in simple terms by saying that the Supreme Court Justices are members of society, and their decision making over time, will reflect changing social norms.[64] It is in this regard that judges such as Lords Griffiths, Lane, Ackner, Goff, Lowry and Woolf for their judgement in the *Pratt's* case;[65] Lord Slynn for his part in the judgement in the *Lewis* case[66] and Lords Scarman and Brightman for their dissenting position in *Riley* case[67] have demonstrated the propensity to be liberal justices and were inclined to deviate from following precedents which reflect changing social norms in the Commonwealth Caribbean society. They see the institutional model of following precedent as a constraint on the development of the law and in particular public policy

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[62] *Hunter v Southam, Inc.* [1984] 2 S.C.R. 145, Can. Justice Dickson said: ("It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.").

[63] *Ibid*.

[64] Lawrence Baum and Neal Devins, 'The Supreme Court and Elites' (2010) 98 Georgetown Law Journal 1515 – 1581 at 1521.

[65] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[66] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[67] *Riley and Others v Attorney-General of Jamaica and Another* [1982] 35 WIR 279, PC.

within the society. Thus, they decide matters on the basis of their personal ideology or judicial preference.[68]

This theory of personal ideology or judicial preference was articulated in a 2006 article by *Czarnezki and Ford* who indicated that Judges decisions are a function of what they prefer to do, tempered by what they ought to do, but constrained by what they perceive is feasible to do.[69] In their writing on *'The Norm of Stare Decisis,' Knight and Epstein* declared that the concept of precedent was a constraint on justices' personal ideology or judicial preference.[70]

These dynamic changes by the liberal judges of the Privy Council was based on the attitudinal model of judicial behaviour whose principle draws heavily on the insights of social choice theory. In this regard *Sisk, Heise and Morriss* indicated that the personal attributes of judges shape social policy that directly influences judicial

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[68] Jack Knight and Lee Epstein, 'The Norm of Stare Decisis' (1996) 40 (4) American Journal of Political Science 1021.

[69] Jason J. Czarnezki and William K. Ford, 'The Phantom Philosophy An Empirical Investigation of Legal Interpretation' (2006) 841 (65) Maryland. Law Review 841 – 906 at 842.

[70] Jack Knight and Lee Epstein, 'The Norm of Stare Decisis' (1996) 40 (4) American Journal of Political Science 1021 declared that: ("Precedent can serve as a constraint on justices acting on their personal preferences. On this account, justices have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a normative constraint in order to produce a decision as close as is possible to their preferred outcome.").

decision.[71] This in reality is applicable to the concept of the attitudinal model which validates the principle that judges can make law.[72]

In support of this theoretical perspective *Kornhauser* indicated that courts do play a law making function as well.[73] More recently a similar sentiment was echoed by *Burbank* who said that Judges are bound to have beliefs about the appropriate role of, and appropriate policies or goals for government, some of which they are bound to translate into law.[74] It is proposed to demonstrate such an idea in this research through the medium of judicial politics. This concept of judicial politics is therefore the environmental factor or stimulus that has engulfed the death penalty in constitutional matters. The threshold of this investigative research is the presentation of the abolitionist ideology for the death penalty, subtly gaining inroads into the judiciary

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[71] Gregory C. Sisk, Michael Heise and Andrew P. Morriss, 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning (1998) 73 (5) New York University Law Review 1377 – 1500 at 1385.

[72] Ronald Dworkin, 'Hard Cases' (1975) 88 (6) Harvard Law Review, 1057 – 1109 at 1058 indicated that: ("Theories of adjudication have become more sophisticated, but the most popular theories still put judging in the shade of legislation. …. Judges should apply the law that other institutions have made; they should not make new law. That is the ideal, but for different reasons it cannot be realized fully in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly.").

[73] Lewis A. Kornhauser, 'Judicial Organisation and Administration' (1999b) New York University School of Law 27 – 44 at 28.

[74] Stephen B. Burbank, 'On the Study of Judicial Behaviour of Law, Politics, Science and Humility' (2009) Paper No. 09 – 11 University of Pennsylvania Public Law and Legal Research 1 – 47.

and exhibiting itself in judicial opinion in what is described in this research as judicial politics.[75]

1.1.1: Statement of Problem

The research problem entails a classical societal problem which is reflected in a statement made in 2007 by Mr. Patrick Manning, the then Prime Minister of Trinidad and Tobago, who said in part that Trinidad and Tobago's inability to carry out the death penalty stems largely from the position adopted by the Privy Council.[76]

This research on judicial politics has evolved through this statement which suggested certain identifiable theory on judicial decision-making in the Privy Council as regards the death penalty in the Commonwealth Caribbean. Therefore this research focuses on exploring, understanding and explaining the reality of Mr. Manning's suggestion which stated in part that the Privy Council has put one impediment after the next in the way of the execution of capital punishment in this country.[77] This pronouncement is suggesting that there is the presence of the concept of judicial politics existing in

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[75] Brian D. Tittemore, 'The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections' (2004) William and Mary Bill of Rights Journal 445 – 520.

[76] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79, Mr. Patrick Manning the then Prime Minister of Trinidad and Tobago said: ("Capital punishment; that has been the subject of a lot of discussion in Trinidad and Tobago, and our inability to carry it out stems largely from the position adopted by the Privy Council. It has been particularly accentuated with the advent of Britain to the European Union and the attitude of the European Union to this whole question of capital punishment. The law lords in London, the Judicial Committee of the Privy Council which, as you know, is the highest court for Trinidad and Tobago, are taking the position that they put one impediment after the next in the way of the execution of capital punishment in this country.").

[77] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

the Privy Council with the interpretation of issues relative to the application of the death penalty in the Commonwealth Caribbean.

It is worth noting that in 1982, the Privy Council decided in favour of carrying out the death penalty in the Jamaican case *Riley and Others v Attorney General.*[78] In that case the Privy Council held that whatever the reasons for or the length of any delay in the execution of a sentence of death lawfully imposed, the delay could afford no ground for holding the execution to be inhuman or degrading or other treatment.[79]

It is evident from that decision that the institutional model was the pattern of judicial behaviour that the Privy Council followed. In this regard it embraced and adopted the binding precedent which was demonstrated in the *Abbott* case.[80] In *Abbott* case the pattern of judicial behaviour of the Privy Council was to follow the binding precedent illustrated in the *De Freitas* case.[81]

An important point to note in the *De Freitas* case[82] was that the Privy Council noted that the issue of delay in execution measured in years was not overcome by the human-rights issue of delay of execution rendering invalid the actual execution itself which

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[78] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[79] *Ibid.*

[80] *Abbott v. Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[81] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[82] *Ibid.*

would have made it *'inhuman and degrading punishment.'*[83] However, eighteen years later the issue of delay in execution arose in the Privy Council in the *Pratt* case.[84] In that case the Privy Council deviated from the precedent in the *De Freitas* case[85] and held that in execution which takes place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.[86]

In an objective review of the decision in *Pratt's* case, and in particular, the statement of law which evolved from it there seems to be judicial politics which is the obvious approach of the Privy Council.[87] Preliminarily, that statement seems to validate the problem which was articulated by Mr. Patrick Manning, the then Prime Minister of Trinidad and Tobago, in his 2007 statement.[88] It was noticeable in the *Pratt's* case that the justices through the attitudinal model approach ignored the institutional model approach of following the precedent in the *De Freitas'* case[89] and gave total

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[83] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[84] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[85] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[86] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC Lord Griffith said ("If capital punishment is to be retained it must be carried out with all possible expedition. Capital appeal must be expedited and legal aid allocated at an early stage. Although no attempt is made to set a rigid timetable, the entire domestic appeal process should be completed within approximately two years. If in any case execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.").

[87] *Ibid.*

[88] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

[89] *De Freitas v Benny* [1975] 27 WIR 318, PC.

recognition to the dissenting judgement of Lords Scarman and Brightman in the *Riley's* case.[90]

The Privy Council also applied the observation made in the *De Freitas'* case[91] in terms of delay measured in years. This is a clear demonstration how precedent can serve as a constraint to the development of law and more specifically how dissention trumped friendly precedent. *Pruksacholavit and Garoupa* explain dissention as a theory of judicial behaviour. In their article on patterns of judicial behaviour they said that it is an attitudinal perspective which explains the ideological or partisan differences in decision making.[92]

However, in *Parenthood of Southeastern Pennsylvania v Cassey* the Supreme Court of the United States warned against this very view when it said that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.[93] By applying this opinion to the position of the Privy Council whereby on several occasions it interpreted several constitutional issues, in particular, the issue of delay

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[90] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[91] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[92] Panthip Pruksacholavit and Nuno Garoupa, 'Patterns of judicial behaviour in the Thai Constitutional Court 2008–2014: an empirical approach' (2016) 24 (1) Asia Pacific Law Review 16 – 35 at 24.

[93] *Parenthood of Southeastern Pennsylvania v Cassey* (1992) 505 US 833 the Supreme Court of the United States warned that: (**"**no judicial system could do society's work if it eyed each issue afresh in every case that raised it … Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

in execution then such would present the apparent danger of the disrespect for continuity of precedent.

On the contrary in *Hunter v. Southam, Inc.*,[94] Justice Dickson in Supreme Court of Canada described the role of the judiciary and, in particular, courts of last resort as it relates to the Constitution as the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[95]

The central theme identified within the difference of opinion in the political statement made by Mr. Patrick Manning the then Prime Minister of Trinidad and Tobago and the decided cases in the aforementioned jurisdictions is the presence of the legal doctrine of judicial politics. Accordingly, *Birdsong* indicates that it is the belief in the region that the Privy Council rulings have hampered the imposition of the death penalty in the English Speaking Caribbean.[96]

This seems to be the idea presented in *Manning's* statement above.[97] It is for such reason that it is proposed to conduct a case law study on the death penalty and legal

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[94] *Hunter v. Southam, Inc.* [1984] 2 S.C.R. 145, Can. Justice Dickson said: ("It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.").

[95] *Ibid.*

[96] Leonard Birdsong, 'The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean' (2005) University of Miami Inter – American Law Review 198 - 227 at 203.

[97] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

analysis on the constitutional appeals of the death penalty matters decided by the Privy Council. The objectivity is to present an understanding of this institutional ideology on the subject matter and to describe the impact that such ideology exhibited on the Commonwealth Caribbean society.

1.1.2: Research Purpose

***Research Aim*: The aim in this research is the examination of key constitutional issues which are necessary for the evaluation of the legal model, the institutional model and the attitudinal model to illustrate and explain the patterns of judicial politics in the decision-making of the Privy Council on the issue of the constitutionality of the death penalty in the Commonwealth Caribbean.**

Nutshell of the present research. In effect the aim entails a presentation of data necessary for an understanding of law, justice and policy in the Commonwealth Caribbean society as they intersect to inform on the death penalty constitutional judgements of the Privy Council. In reality this research is applicable to the criminal justice discipline which focuses on the classical theory of society that was made famous in 1764 by *Cesare Beccaria*.[98] In his essay: *'On Crimes and Punishments'* which was published in July of that year *Beccaria* called for a rethinking of the prevailing concepts of law and justice.[99] This rethinking was necessary to roll back the nature of injustice then where the accused once arrested, had few legal protections,

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[98] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004) 29.

[99] Ibid.

virtually no legal assistance, is subjected to torture, kept in secret from their family and friends and the accusers testified in secret.[100]

Such is the nature of the present research which involves an evaluation into judicial opinion on the death penalty to understand and explain its impact on the Commonwealth Caribbean. It would be revealed in this exploratory research that in the Republic of Trinidad and Tobago and Barbados, the death penalty is the punishment mandated for persons convicted of murder.[101] The extent of the mandatory nature of this punishment has been reflected in statute[102] and also in several judicial interpretations on the issue of the constitutionality of the death penalty.[103]

For instance, in the Republic of Trinidad and Tobago the Offences Against the Person statute proclaims that: *"Every person convicted of murder shall suffer death."*[104] This legislative provision seems to suggest that the death penalty is mandatory for persons convicted of murder in the Republic of Trinidad and Tobago.[105] By necessary implication this provision also means that the judges of the High Court have no

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[100] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004) 29.

[101] Offences Against the Person Act, Republic of Trinidad and Tobago Chapter 11: 08, s. 4 and (Constitution (Amendment) Act of Barbados 2003.

[102] Ibid.

[103] *De Freitas v Benny,* [1975] 27 WIR 318. PC; *Guerra v Baptiste and others* [1995] 3 All ER 583, PC *and Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[104] Offences Against the Person Act, Republic of Trinidad and Tobago Chapter 11:08, s. 4.

[105] Ibid.

discretion where the passing of sentencing is concerned for a person convicted of murder.[106]

Despite the obvious meaning ascribed to this statutory provision there have been several constitutional challenges to the death penalty as the punishment for persons convicted of murder. Those challenges were based on the fact that the death penalty is considered by some as a cruel and unusual treatment or punishment and as such it is contrary to section 5(2) (b) of the Constitution which prohibits Parliament from imposing cruel and unusual treatment or punishment.[107]

While this constitutional provision gives protection to persons from Parliament imposing any punishment that is cruel and unusual, it cannot be looked at in isolation. In other words this section must be identified along with section 2 of the Constitution which clearly reinforces the supremacy of the Constitution.[108] That constitutional provision clearly indicates that the Constitution is supreme to any law which gives the authorisation for the imposition of a punishment that is cruel and unusual.

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[106] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[107] Constitution of the Republic of Trinidad and Tobago, s. 5(2) (b) in principle states that: ("Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not – impose or authorise the imposition of cruel and unusual treatment or punishment.").

[108] Constitution of the Republic of Trinidad and Tobago, s. 2 declared that: ("This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with the Constitution is void to the extent of the inconsistency.").

However, the death penalty in the Commonwealth Caribbean has been challenged as a cruel and unusual punishment. A key constitutional matter which challenges the death penalty in terms of the issue of delay in execution, was the *Pratt* case. In that case it was noticeable that the Privy Council presented a statement of law which seems to illustrate a major problem associated with the death penalty in the region. That statement indicates that if an execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.[109]

It is proposed to explore in this research the policy issues raised in this statement. Primarily it revolves around the classical scientific research embracing an aspect of the death penalty system of justice within the Commonwealth Caribbean Society. This classical research type is undertaken in order to illustrate and address an immediate social phenomenon within this region's criminal justice system.

That social phenomenon is concerned with the manner in which persons are punished on conviction for murder in the Commonwealth Caribbean region. *Berman* looking at the American criminal justice system on this same issue, suggested that it may be appropriate to provide critical means to engineer remedies through a broader legislative reform effort for improving the death penalty administration.[110]

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[109] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[110] Douglas A. Berman, 'The Challenges of "Improving" The Modern Death Penalty' (2016) 11 (1&2) Duke Journal of Constitutional Law and Public Policy 35 – 49 at 49 suggested ("concern for capital punishment's administration may ensure that our legal institutions do not get complacent about problems that pervade our criminal justice systems, and may even provide a critical means to engineer remedies to system-wide problems through broader legislative reform efforts. In other words, even if efforts to improve the modern administration of capital punishment may, more often than not, constitute

It is in this regard that it necessitates the acquisition of new knowledge to explain scientifically the concept of judicial politics which has engulfed the Privy Council in deciding the issue of the constitutionality of the death penalty in the Commonwealth Caribbean. Such knowledge would be acquired herein through the research methods of content analysis and secondary data analysis.[111]

Moreover, it is proposed to commence this research goal by articulating some aspects of it through the evaluation and analysis in the literature review. This will be demonstrated through the legal, institutional and attitudinal approaches of the Privy Council in death penalty cases. The focus is to illustrate that this institution has vigorously adopted the legal doctrine of judicial politics which creates a general restriction of the death penalty in the region. This research will make a difference in the society by identifying judicial politics as an element within the regional justice system.

For the Commonwealth Caribbean Society, this type of research effort, necessitates the making of a significant contribution in the legal administrative criminological field and in particular the area of criminal justice. Moreover, it would scientifically add to the growing body of knowledge on the death penalty specifically in the area of judicial

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something of a fool's errand, this foolishness still can foster an enhanced understanding of, and an enduring commitment to always taking on, the challenges of seeking "too much justice" throughout our criminal justice systems.").

[111] Kenneth D. Bailey, *Methods of Social Research* (2nd edn. Free Press New York 1982).

politics. This aspect of the research will be channelled through the research evaluation method.[112]

An important objective in this regard entails the presentation of data on the application of the death penalty in the Commonwealth Caribbean to illustrate the judicial politics in the Privy Council. Research in this area requires an analysis of data on judicial opinions and statutes to present the nature of the death penalty in the Commonwealth Caribbean. The objective is to evaluate judicial opinions on the death penalty at the level of the Privy Council to illustrate the concept of judicial politics through its institutional and attitudinal approaches. This would be explained by showing the use of the judicial process to restrict the application of the death penalty. It will be seen also that the Privy Council is engaging in human rights norms by applying the fundamental rights provisions of the Constitution to the existing law of the Commonwealth countries.

Thus, in such a pursuit it would be necessary to show that unlike the Republic of Trinidad and Tobago[113] and Barbados,[114] there is no mandatory death penalty in

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[112] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company 1992) 346 – 368.

[113] Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11 : 08.

[114] Offences Against the Person Act of Barbados No. 18 of 1994.

Jamaica,[115] the Eastern Caribbean States[116] and in Belize.[117] In the case of the Cooperative Republic of Guyana there is a limitation to the mandatory death penalty. That is to say it is mandatory only for persons convicted of murdering law enforcement officials, prison officers and members of the judiciary.[118] According to the statutory provisions in the Commonwealth Caribbean States the death penalty is carried out by hanging by the neck.[119]

However, despite its apparent legality, the death penalty is an issue that has been given significant attention over the last two decades.[120] This is as a result of several common problems associated with it, primarily in the area of its mandatory nature. *Harrington* in an article described the mandatory death penalty as a colonial legacy and it was the only punishment that could be pronounced by a judge upon a person who was convicted of murder. [121]

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[115] Offences Against the Person (Amendment) Act) of Jamaica 1992 and *Watson v Attorney General of Jamaica* [2004] 64 WIR 241, PC.

[116] *Hughes v The Queen* [2002] 2AC 284, PC and *Fox v The Queen* [2002] 2 AC 259, PC.

[117] *Reyes v The Queen* [2002] 2 AC 235, PC.

[118] Criminal Law Offences (Amendment) Act of the Cooperative Republic of Guyana No. 14 of 2010.

[119] Dana S. Seetahal, *Commonwealth Caribbean Criminal Practice And Procedure* (Cavendish Publishing Limited 2001) 447 and Criminal Procedure Act of the Republic of Trinidad and Tobago Chapter 12: 02.

[120] Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate. Conviction for Murder, the Death Penalty and the Reality of Homicide in Trinidad and Tobago* (European Commission and Foreign and Commonwealth Office 2006) 1 – 64.

[121]Joanna Harrington, 'The Challenge To the mandatory Death Penalty in the Commonwealth Caribbean' (2011) 98 (126) The American Journal of International Law 130 said: **(**"The mandatory death penalty is a colonial legacy. Under the common law of England, death was the only sentence that could be pronounced by a judge upon a defendant who was convicted of murder, regardless of the nature of the offense or the particular circumstances of the offender.").

It was indicated by *Bagaric* that mandatory punishment is considered a fixed penalty and it should be rejected.[122] This idea by *Bagaric* seems to be a widely held sentiment, since prior to this publication *Tonry* in a similar comment indicated that the greatest gap between knowledge and policy in American sentencing concerns mandatory penalties.[123]

The depth of such feelings against the mandatory death penalty can be gleaned from the constitutional provisions within the region that outlaw cruel and unusual treatment and inhuman or degrading punishment or other treatment or punishment.[124] In the Republic of Trinidad and Tobago, the Constitution prohibits such punishments.[125] That constitutional provision seems to be in direct conflict with the penal provisions that authorise the application of the death penalty as the punishment for murder.[126]

It should be noted that the law on the death penalty for murder in the Republic of Trinidad and Tobago was in existence before the 1976 Republican Constitution. Of utmost judicial significance in this area is the Privy Council's decision in the *Pratt*

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[122] Mirko Bagaric, *Punishment And Sentencing: A Rational Approach* (London Cavendish Publishing Limited 2001) 254.

[123] Michael Tonry, *Sentencing Matters* (New York Oxford University Press 1996) 134 indicated that: ("The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners and social science researchers have long agreed, for practical and policy reasons … that mandatory penalties are a bad idea.").

[124] Constitution of the Republic of Trinidad and Tobago, s. 5 (2) (b); Constitution of Jamaica, s. 17 (1); Constitution of St. Lucia, s. 5; the Constitution of St. Christopher and Nevis, s. 7 and Constitution of Belize, s. 21(7).

[125] Constitution of the Republic of Trinidad and Tobago, s. 5 (2) (b) states that ("Parliament may not impose or authorise the imposition of cruel and unusual treatment or punishment.").

[126] Offences Against the Person Act of the Republic Trinidad and Tobago Chapter 11: 08.

case.[127] That case did address the conflict which permeates both principles of law. Since the decision in that case, the Commonwealth Caribbean region has seen limited success in executing convicted murderers. The situation which accounts for the lack of execution in the region is attributed to the legal doctrine that arose in the Privy Council's decision in *Pratt* case.[128]

This has been a profound and far-reaching judicial pronouncement that was made by the Privy Council. However, in a deeper evaluation of it, one can suggest that it was a judicially contrived political statement which illustrates the concept of judicial politics. In practicality, this statement contains several principles, the effect of which has serious implications as it relates to the implementation of the death penalty in the region.[129]

Firstly, the *Pratt* decision illustrates the reinforcement and confirmation of the law on delay in the application of the death penalty in the region.[130] However, there is evidence that this principle was earlier advocated by the Privy Council in 1979 in *Abbott v Attorney General of Trinidad and Tobago and others.* In that case Lord

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[127] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[128] *Ibid.*

[129] *Ibid.*

[130] *Ibid.*

Diplock said that where the delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not by due process of law.[131]

This statement clearly suggests that Lord Diplock left the door open on delay in carrying out of the death penalty measured in years. However, it seems that he was telegraphing that, such delay might be deemed intolerable. Moreover, that statement was clearly a judicially contrived political statement in the sense that it suggests that the delay measured in terms of years, although it did not arise in this present case, may arise in the future and would be unconstitutional.[132]

The principle on delay in execution in terms of years remained a lingering issue and it was decided by a 3 to 2 majority in the *Riley* case.[133] In that case the Privy Council held that whatever was the reasons for or the length of any delay in the execution of a sentence of death lawfully imposed, the delay could afford no ground for holding the execution to be inhuman or degrading or other treatment.[134]

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[131] *Abbott v Attorney General of Trinidad and Tobago and others* [1979] 1 WLR 1343, PC. Lord Diplock said: ("In their Lordships' view the proposition that, in the circumstances of the instant case, the fact that seven or eight months elapsed before the applicant's petition for reprieve was finally disposed of by the President made his execution at any time thereafter unlawful, is quite untenable. Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open.").

[132] *Abbott v Attorney General of Trinidad and Tobago and others* [1979] 1 WLR 1343, PC.

[133] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[134] *Ibid.*

This pronouncement was made by Lord Bridge to which Lord Hailsham and Lord Diplock agreed. Here the Privy Council formally demonstrated that delay cannot be used as a bar to the implementation of the death penalty. However, the issue of delay in carrying out the death penalty remains a thought provoking one and in the *Pratt* case the Privy Council was responsible for a policy change in the death penalty law in the Commonwealth Caribbean particularly in the area of delay in execution defining it in terms of years.[135]

It seems clear that *Pratt* decision[136] have been made rejecting the majority opinion and totally embracing the minority opinion in the *Riley* precedent[137] on the one hand and also by overlooking or ignoring legislation in the region with an opposing position on the other hand.[138] In fact the Privy Council decision in the *Pratt* case[139] ignored the precedent in the *Riley* case and gave total recognition to the dissenting judgement of Lord Scarman and Lord Brightman in that case.[140]

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[135] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[136] *Ibid.*

[137] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[138] Supreme Court of Judicature Act. Republic of Trinidad and Tobago *Chapter* 4 : 01, s. 51.

[139] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[140] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC and the *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC. Lord Griffith said: ("While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little *caveat*, but only after that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused may be responsible, it would not alter the dehumanising character of the delay.").

The Privy Council had judicially contrived this policy statement to articulate its new judicial ideology. Thus, the minority judgement in the *Riley* case[141] and later the *Pratt* decision[142] clearly articulate the research problem herein. In fact, this is the crux of the judicial politics argument in this research. These cases clearly demonstrate the fact that the Privy Council is now championing the human rights cause against the death penalty, in this instance, on the ground of delay of execution and not on the ground of the nature of the punishment itself.

The dehumanising effect of the death penalty was previously articulated in the Supreme Court of California in the case the *People v Anderson.* In that case the court emphasises the dehumanizing effects of the lengthy imprisonment prior to execution. It is clear that the court was of the view that the inordinate length of time the prisoner is incarcerated awaiting execution, amounts to cruelty even though judicial and administrative procedures are essential for the due process of law to be carried out.[143]

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[141] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[142] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[143] *People v Anderson* 493 P 2d 880 (Cal. 1972) the Supreme Court of California indicates: ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. The Respondent concedes the fact of lengthy delays between the pronouncement of the judgement of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant's review of the judgement condemning him to death does not render the period of impending execution any less torturous or exempt such cruelty from constitutional proscription.").

In the Republic of Trinidad and Tobago there is a statutory provision that implicitly authorises delay in the circumstance of the application of the death penalty. Accordingly, section 51 of the *Supreme Court of Judicature Act Chapter 4:01* indicates that all appeals in the case of a conviction involving the sentence of death shall be heard before the sentence is executed. This statutory authority specifically authorised delay.[144]

By necessary implication there appears to be conflict in the content of the judicial statement of law in the *Pratt* case[145] when compared with both the majority judicial position taken in *Riley* case[146] and also the legislative position illustrated in section 51 of the *Supreme Court of Judicature Act Chapter 4:01*.[147] It is an important point to note that from an evaluation it therefore means that section 51 of the *Supreme Court of Judicature Act Chapter 4:01* also implicitly legislated delay in the application of the death penalty in the Republic of Trinidad and Tobago.[148]

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[144] Supreme Court of Judicature Act. Republic of Trinidad and Tobago *Chapter* 4 : 01, s. 51 states: ("In the case of a conviction involving sentence of death or corporal punishment— (a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and (b) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused of the application.").

[145] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[146] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[147] Supreme Court of Judicature Act. Republic of Trinidad and Tobago *Chapter* 4 : 01, s. 51.

[148] Ibid.

While the Privy Council can overrule its earlier decisions and in fact has done so with respect to the principle of delay in execution in the *Riley* case[149] there can be serious danger in doing so.[150] On a deeper evaluation it may have been that the Privy Council decision in the *Pratt* case[151] was made by either overlooking such statutory provision within the region or forcing a re-interpretation of the issue of delay in execution. As a consequence one can validate as credible the idea that the Privy Council has re-interpreted the laws within the Commonwealth Caribbean in its decision in the *Pratt* case and as such it was driven by judicial politics.[152]

Secondly, the *Pratt* decision was indeed a major victory for the abolitionist cause.[153] Naturally the statement of law in that case is a factor that grinds to a halt the application of the death penalty in the Commonwealth Caribbean region. It is evident from the decision in *Pratt's* case,[154] that the Privy Council was deeply concerned with the treatment meted out to convicted murderers. Thus, such a concern has accounted for the judgement which demonstrates a move in the direction of the abolition of the death penalty.[155]

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[149] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[150] Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 1 – 183.

[151] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[152] *Ibid.*

[153] *Ibid.*

[154] *Ibid.*

[155] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 343 such a position can be deduced from an evaluation of the part of the judgement which indicates: ("The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between

This statement is also evidence of judicial politics since it demonstrates a significant advancement of the cause of human rights as a rationale to stop the death penalty. Primarily, it seems from an assessment of this statement that the Privy Council proceeds to restrict the death penalty in the region on the grounds of an interpretation of inhumanity or cruelty. By doing so the Privy Council made the statement in the *Pratt* case[156] which was a judicially contrived policy to both discourage and dismantle the death penalty in the region.

Thirdly, the *Pratt* decision[157] was responsible for policy changes in the region's justice system. The legal doctrine in the *Pratt* case[158] has brought about both legislative[159] and administrative reforms within the Commonwealth Caribbean States as regional governments took measures to stymie its effect.[160] These changes were necessary to ensure that there is a strict compliance of the principle and concepts in the *Pratt* legal doctrine.[161]

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hope and despair in the fourteen years they have been in prison facing the gallows.... It is against this disturbing background that their lordships must now determine this constitutional appeal and must in particular re-examine the correctness of the majority decision in *Riley and Others v Attorney-General of Jamaica and Another* (1982). 35 WIR. 279.").

[156] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 343.

[157] *Ibid.*

[158] *Ibid.*

[159] Constitution (Amendment) Act of Barbados No. 10 of 2003.

[160] Republic of Trinidad and Tobago, *Status Report on the Implementation of the Death Penalty in Trinidad and Tobago* (Ministry of the Attorney General and Legal Affairs Trinidad 1998) 1 – 11.

[161] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

Fourthly, the statement in the *Pratt* case has brought to the fore several constitutional issues that were unprecedented and those issues evoked controversy of a constitutional nature.[162] Paramount among these issues is the negative response towards the Privy Council and in particular its role as an appellate institution for the Commonwealth Caribbean region.

Finally, it was proffered that the position taken by the Privy Council in the *Pratt* case exhibited a distinct erosion of the doctrine of parliamentary sovereignty within States in the region.[163] That is to say, the *Pratt* legal doctrine is an indication that the Privy Council through subtle means gained inroads into the legislative realm of regional governments.[164] The reality is, that statement is a directive from the Privy Council for the regional governments to follow rather than an interpretation of the Constitution. Thus, by necessary implication it has brought into sharp conflict the role of the Privy Council as a judicial tribunal as against the role of Parliament as a legislative body.[165]

It has been suggested that the immediate effect of those implications is that notwithstanding, that the death penalty is mandatory for a murder conviction in the

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[162] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[163] *Ibid.*

[164] *Ibid.*

[165] Hamid Ghany, 'The Death Penalty and the Judicial Committee of the Privy Council' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 108 – 119.

Republic of Trinidad and Tobago, any calculated or unconscionable delay in carrying it out that can be measured in years, would render it to be deemed unconstitutional.[166] Thus the *Pratt's* decision exposes the reality of the mandatory death sentence for murder to the fact that it has an expiry date. This expiry date may be in the first instance, two years after the sentence was passed in which case the entire domestic appeal process must be completed or in the second instance, five years after the sentence of death has been passed in which case all appeals processes and petitions to international human rights bodies should be completed as outlined in *Pratt's* case.[167]

That expiry date has been recognised as an element of the paradox of the constitutionality of the mandatory death penalty in the Commonwealth Caribbean.[168] It should be noted that this factor has been described as the main feature in the *Pratt* case.[169] This is the major reason why this *Pratt* legal doctrine is worthy of investigation.[170] Such an investigation will expose another element of the death penalty which in this exploration entails the concept of judicial politics. This is evident from a criminal justice standpoint, to provide a greater understanding of the concept of judicial politics which is immersed within that statement of law.[171]

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[166] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 343.

[167] *Ibid.*

[168] *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce* (CCJ Appeal No. CV002 of 2005).

[169] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[170] *Ibid.*

[171] *Ibid.*

It is proposed in this investigation to capture all the issues raised in this section along with the fact that the Privy Council through its doctrinal-politics models has done what the Parliaments in the region have failed to do. That is it reversed itself on the issue of delay in carrying out the death sentence and then created a judicial time limit which is measured in years and which has a negative effect on the majority decision in the *Riley's* case[172] and also on the provision of section 51 of the *Supreme Court of Judicature Act Chapter 4:01*.[173]

It is also proposed to present this description as a leading indicator of judicial politics in the constitutionality of the death penalty in the region. Here the existing precedent in the *Riley* case[174] has been trumped by judicial politics through the re-interpretation of the issue of delay in execution in the *Pratt* case.[175] It is also worth noting that another objective of this research is to focus on the presentation of data on the death penalty in the Commonwealth Caribbean. This would be done in chapter four and it would complement the other issues mentioned in this research regarding the Privy Council rulings on the constitutionality of the death penalty and presented in chapter five.

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[172] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[173] Supreme Court of Judicature Act. Republic of Trinidad and Tobago *Chapter* 4 : 01, s. 51.

[174] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[175] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

However, the ultimate objective of evaluating judicial decisions of the Privy Council is to demonstrate the influence of judicial politics in the death penalty decisions. The specific purpose of this research is to increase our understanding of three factors namely - original intent, precedent and judicial ideology – that influence the Privy Council decision on the constitutionality of the death penalty**.**

These specific factors would be defined in this research in terms of the legal and institutional approaches of the Privy Council and also in terms of the judges' attitudinal approach of judicial decisions.[176] Such approaches will further explain the decision making of the Privy Council in constitutional decisions in death penalty cases. It is worth noting that in this research there will be no focus on the merits of the death penalty but primarily an analysis of judicial ideologies.[177] However, the illustrative information and data unearthed and presented herein have caused the researcher to comment on the merits of the death penalty in his personal statement in the section on recommendations in chapter seven.

In reality, this research will present the sort of behaviour by the Privy Council where its members implicitly developed an agenda relative to the death penalty. That agenda is synonymous with the abolitionist movement against the death penalty which is now

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[176] Jeffrey A. Segal, and Harold J. Spaeth, *The Supreme Court and the Attitudinal Mode* (Cambridge University Press 1993) 73.

[177] Ernest A. Young, 'Judicial Activism and Conservative Politics,' (2002) 73 (4) University of Colorado Law Review 1144 – 1216 at 1139 - 1216.

clearly visible in the judiciary and is presented in this research in the aspect of judicial behaviour – the attitudinal approach.[178]

The attitudinal model approach is observed whereby the members of the Privy Council exhibit a liberal stance and decide matters according to judicial preferences or ideologies. With this approach it is noticeable that the justices of the Privy Council were liberal in nature and depart from following the binding authority of judicial precedents and focus on their attitudinal role of overruling precedents.[179]

In this research, the attitudinal approach of judges is pitted against the institutional or the legal approach of the Privy Council. The attitudinal model claim that judges' decisions reflect their unconstrained policy preferences or ideologies.[180] Thus, the common thread which is visible in this model is the concept of judicial politics. Strong anecdotal evidence suggests that there is a relationship between judicial politics and the constitutionality of the death penalty. This was embedded in the pronouncements made by the Privy Council in the statement of law in the *Pratt* case[181] and the dissenting judgement by Lord Hoffman, in the *Lewis* case.[182]

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[178] Jeffrey A. Segal, and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993) 73.

[179] Jack Knight, and Lee Epstein, 'The Norm of Stare Decisis,' (1996) 40 (4) American Journal of Political Science 1018 – 1035 at 1021.

[180] Ibid.

[181] *Pratt and Another v. Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[182] *Lewis et al v. Attorney General of Jamaica and another* [2001] 2 AC 50, PC. Lord Hoffman said: ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently,' the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

This dissenting statement is a denunciation of the vigorous attempt made by the Privy Council to restrict the death penalty in the Commonwealth Caribbean. It also on the other hand, depicts the lack of certainty within the justice system where the evidence illustrates instability in the administration of justice in the Caribbean. Moreover, it is an acknowledgement of the doctrine of judicial politics which is promoted in the Privy Council.[183]

This concept of judicial politics was articulated by *Shapiro* who said that the Court was part of politics even though it was a court of law, because all law, including constitutional law, was a part of politics.[184] Therefore, for the purposes of this investigation, the research on judicial politics shall embrace an assessment of the general theory of judicial behaviour by the Privy Council in constitutional appeal cases on the death penalty and those appeal cases that have a Commonwealth Caribbean slant.

It is proposed in this research exploration to evaluate and assess constitutional appeal cases on the death penalty in order to demonstrate that judicial statements have been somewhat contrived and that the Privy Council has engaged in a quest to reverse itself on its interpretation of the word *"cruelty"* used in the Constitution as it relates to the

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[183] Mirko Bagaric, *Punishment And Sentencing: A Rational Approach* (London Cavendish Publishing Limited 2001) 19.

[184] Martin Shapiro, 'Morality and Politics of Judging' (1989) 63 Tulsa Law Review, pp. 1555, 1555-1556 (reviewing Michael J. Perry, Morality, Politics and Law 1988).

death penalty. This reversal saw a development of the concept of cruelty of the death penalty by the Privy Council. It was argued that this judicial development, in relation to the cruelty of the death penalty, has resulted in the limitation of the application of the death penalty in the region.[185]

There is evidence to suggest that the Privy Council has been restricting the implementation of the death penalty in the region through the interpretation of the terms *cruelty* used in the Constitution. Thus, it is apparent that the Privy Council deviated from applying existing law when matters dealing with the issue of *cruelty* came before it.[186]

For instance the cases of *Thomas and Another v Baptiste,*[187] *Reckley v Minister of Public Safety and Immigration and others (N0. 2),*[188] *Fisher v Minister of Public Safety and Immigration*[189] and *Lewis et al v Attorney General of Jamaica and another*[190] are of notable significance here and are used to at best illustrate the legal doctrine of judicial politics. Those cases present evidence of the attitudinal and the institutional approaches both of which are characteristics of the judicial politics of the Privy

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[185] *Lewis et al v. Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[186] *Pratt and Another v. Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC; *Guerra v Baptiste and others* [1995]4 All ER 583, PC and *Lewis et al v. Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[187] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

[188] *Reckley v Minister of Public Safety and Immigration and others* (No. 2) [1996] 1 All ER 562, PC.

[189] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

[190] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

Council. They specifically dealt with the issues of prison conditions, ministerial advice prior to execution and opinions of International Human Rights Bodies on the petition for reprieve.

In the case *Thomas and Another* the Privy Council held that prison conditions could not amount to cruel and unusual punishment.[191] However, three years later the Privy Council deviated from this position and held in the *Lewis* case that prison conditions could amount to cruel, inhuman and degrading treatment.[192] In relation to ministerial advice prior to execution the Privy Council in the *Reckley* case (No. 2) held that the appellant had no right to make a representation before the Mercy Committee.[193]

However, five years later in the *Lewis* case the position of the Privy Council on that issue was overturned.[194] Similarly in the *Fisher* case, the Privy Council held that it was not necessary to have the report of International Human Rights Bodies before an execution can be carried out.[195] This position was also overturned one year later by the Privy Council in the *Lewis* case.[196]

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[191] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

[192] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[193] *Reckley v Minister of Public Safety and Immigration and others* (No. 2) [1996] 1 All ER 562, PC.

[194] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[195] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

[196] *Ibid.*

When an evaluation was made on these judgements it was discovered that the Privy Council in the *Lewis* case had ignored and deviated from its own previous decisions on the three issues.[197] Moreover, there has been no indication that any new situation has developed to warrant overturning or deviating from the earlier decisions in the *Lewis* case.[198] It therefore stands to reason that this later judgement was not based on an application of the rule of law that was in existence at the time but was clearly driven by judicial politics.

The action by the Privy Council in the *Lewis* case signals that the justices of the Privy Council have taken on the judicial role to restrict the death penalty in the region.[199] This was strongly criticised by one of its own members, Lord Hoffman, who criticised the justices for coming out differently. In effect Lord Hoffman was alluding to the attitudinal approach of the liberal justices of the Privy Council.[200]

Preliminary this is the description of the research hypothesis that the concept of judicial politics does exist in the Privy Council decision on the death penalty. It is this said perspective that this research has been articulating, when it was suggested that the Privy Council exhibits a liberal stance and decides matters according to judicial preferences or ideologies. The cases reviewed indicate that the Privy Council

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[197] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[198] *Ibid.*

[199] *Ibid.*

[200] *Ibid.*

articulated the concept of judicial politics through its interpretation of the following terms used in the Constitutions in the Commonwealth Caribbean:

1. Inhuman or degrading treatment or punishment in the Constitution of Jamaica and the Eastern Caribbean States.
2. Cruel and unusual treatment or punishment in the Constitution of the Republic of Trinidad and Tobago.

The important factor here is that the Privy Council interpretation of the issues surrounding cruelty have resulted in the restriction of the implementation of the death penalty on the basis that it has ascribed cruelty in terms of:

1. Delay of execution
2. Swiftness of execution
3. Mandatory death sentence
4. Prison conditions
5. Ministerial advice prior to execution and
6. Opinions of International Human Rights Bodies on the petition of reprieve.

It is proposed to evaluate and analyse the paradigm of the Privy Council on each of these forms of judicial expression of cruelty. This is the research objective and the evaluation would be necessary in order to have a greater understanding of the concept of judicial politics through interpretation of constitutional provisions.

However, it is important to note that evolving from the six aspects of judicial expression of cruelty is the conscious denunciation of the death penalty at the level of the judiciary. That is to say the Privy Council, through the influence of judicial politics, has demonstrated a vigorous negative attitude towards the death penalty in

the region.[201] In so doing that judicial institution expanded the interpretative scope in dealing with death penalty matters. This is achieved by the broadening of the interpretation of cruelty and thus resulted in the restriction of the death penalty. This approach of judicial politics in the Privy Council is presented in chapter five of this research.

The final objective of this research is to contextualise and critically analyse a variety of human rights issues that impact on the death penalty in the Commonwealth Caribbean. This is complementary to the analysis on the approach of the Privy Council on judicial politics and would be presented in detail in chapter six. Thus the main argument in this research is that while it is accepted that the Privy Council has an important role in making policy, its policy-making role in death penalty matters is largely within a framework of a constitutionally restrictive one. It is this restrictive approach of the Privy Council that reflects directly on the human rights issues.[202]

1.1.3: Research Problem

Research thesis. The essence of this thesis revolves around *Judicial Politics in the Privy Council and its impact on the Constitutionality of the Death Penalty in the Commonwealth Caribbean.* Its primary purpose is to search for a criminal justice understanding of the judicial politics demonstrated in the Privy Council on the

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[201] *Pratt and Another v. Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC; *Guerra v Baptiste and others* [1995] 4 All ER 583, PC and *Lewis et al v. Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[202] *Ibid.*

constitutional appeals of the death penalty from a Commonwealth Caribbean perspective. The geographical focus of this research is ideal since it embraces the States in the region that have the mandatory death penalty and also have the Privy Council as their final judicial arbiter. This research effort will contribute to the building of Caribbean legal and administrative criminological solution in the sphere of criminal justice.

Interestingly *St. Jean* defined this type of research effort as: *"the scientific study of the legal and social construction of criminal and deviant behaviors, efforts at regulating such behaviours, and the social impacts of those behaviors as they relate to the Caribbean region or members of the Caribbean Diaspora."*[203] The reality of this statement is that it describes the nature and relation of a research of the justice system in the Caribbean society. By applying *St. Jean's* perspective[204] herein, one will see an investigation of the death penalty in the Commonwealth Caribbean society. Special emphasis shall be placed on the approach of the Privy Council in terms of judicial politics and the constitutionality of the death penalty.

This purpose is achieved by navigating through a qualitative methodology. This necessitates a case law study and a legal analysis in order to isolate the concepts, define the hypothesis and explain the variables in order to understand and predict the

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[203] Peter K. B. St. Jean, 'Caribbean Criminology – An Empirical: A Further Critique.' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 229.

[204] Ibid.

underlying nature or paradigm of the reality of the death penalty in the region. This reality or paradigm presents the picture which demonstrates that there is the influence of judicial politics on decisions of the constitutionality of the death penalty in the region.

In light of the conflicting decisions in the *Riley* case[205] and in the *Pratt* decision,[206] this research seeks to provide and analyse data to understand and explain the presence of judicial politics in the decisions of the constitutionality of the death penalty in the Commonwealth Caribbean. It is in this regard that the undermentioned research question has been isolated for investigation.

- Whether in light of both the majority and minority decisions of the Privy Council in the *Riley* case[207] and the subsequent ruling in the *Pratt* case,[208] which adopted and embraced the said minority or dissenting decision in the *Riley* case,[209] the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics.

This is a public policy issue which demands investigation to discover whether or not there are impacts on the public interest. An important point to note here and stemming

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[205] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[206] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[207] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[208] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[209] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

from the examination of the *Pratt* decision[210] is that it seems plausible and indeed credible that the constitutionality of the death penalty in the Commonwealth Caribbean depends on an environmental determinant. Thus, this research will demonstrate that the Privy Council is the environmental determinant which impacts on the death penalty in the region. It therefore means that institutional and structural determinants of the Privy Council stimulate the legal doctrine of judicial politics that impacts on the constitutionality of the death penalty in the region.

1.1.4: Scope and Significance

The overall significance in the scope of the research is governed by the fact that in the Commonwealth Caribbean the only area in which the death penalty has had any reform is in the arena of judicial opinion, and more specifically through the perspective of judicial politics in the Privy Council. It is in this light that the significance of this research can be illustrated in three ways.

Practical significance. Firstly, this research is in general of practical significance to this region. From this standpoint it will be seen that this research will be adding to the current debate on the death penalty. The debate on this subject continues unabated in the Commonwealth Caribbean region where the Constitution in some states recognises the death penalty as the punishment for persons convicted of murder. The intensity of this debate is evident from a number of cases which are dealt with by the Privy

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[210] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

Council, one of which is the *Pratt* case[211] and also through academic criticism.[212] In this regard, this research by adding to the debate will generate a new idea of judicial politics in the Privy Council which has helped to further explain the constitutionality of the death penalty in the region.

Scientific significance. Secondly, this research is of scientific significance. As regard to the area, this research has brought to the fore the new social science idea of judicial politics, as an element of the constitutionality of the death penalty. It should be noted that the concept of judicial politics is a dimension that engulfed judicial opinion on issues dealing with the constitutionality of the death penalty. It is not an isolated issue but is an entrenched judicial behaviour which is inherent within judicial rulings on the death penalty.

C*ontribution to knowledge*. The third significance of this research is based on its scientific contribution to knowledge. It is worth noting that this research has shown that there is no other known project in this region which presents the element of judicial politics in the constitutionality of the death penalty. Thus, in this regard this research has provided an understanding of the dynamic relationship between judicial politics and the death penalty. In so doing it also provides the opportunity to occupy a part of the vacuum in the research context of judicial behaviour on issues revolving

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[211] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[212] Roger, Hood and Florence Seemungal, *A Rare and Arbitrary Fate. Conviction for Murder, the Death Penalty and the Reality of Homicide in Trinidad and Tobago* (European Commission and Foreign and Commonwealth Office 2006) 1 - 76.

around the death penalty in the region. In addition, it will place the perspective of the Commonwealth Caribbean region alongside the considerable body of jurisprudence and literature relating to the death penalty worldwide.

It should be noted that there is a paucity of similar research in the Commonwealth Caribbean, examining judicial politics within the context of the constitutionality of the death penalty. This opinion evolved from the current debate, that the death penalty in the region is influenced by judicial politics. In this regard the mere fact that this research exhibits a scientific contribution to knowledge will most definitely be significant for its originality.

1.2: Conclusion

This chapter presents a synopsis of the research purpose, problem and scope to be developed in the context of this research. From the background study presented, there is no doubt that the present debate surrounding the implementation of the death penalty in the Commonwealth Caribbean is as a direct result of the *Pratt's* legal doctrine.[213] It should be noted that there are concealed issues embedded within that doctrine, some of which were enumerated in the background study of this research.

In essence, the primary research focus to be presented is the nature of the judicial politics at the Privy Council. It is demonstrated during the judicial process of the Privy Council producing public policy decisions in judicial appeals on the constitutionality

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[213] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

of the death penalty. It seems from the synopsis presented in this chapter that the Privy Council's judicial reasoning on the death penalty is not on the basis of the legal model or the rule of law. The reality is that the Privy Council through its attitudinal approach has taken up the mantle to impose public policy standards as it relates to the death penalty in the Commonwealth Caribbean. This was achievable under the guise of statutory interpretation in the application of constitutional provisions and not through the parliamentary original intent which is through the legislative process. [214]

These issues along with other complementary factors such as the policy perspective of the death penalty and human rights issues will be pragmatically explored and evaluated in more detail later in this research. Such exploration is needed to satisfy the research objective of investigating the extent to which the decisions in the Commonwealth constitutional appeals impact on the death penalty in the Commonwealth Caribbean.

In essence the issues illustrated in this chapter were presented in a nutshell and will be further developed in this research. In the next chapter a review of the literature on judicial politics and the death penalty characteristics will be presented. The aim of this literature review is to have an understanding of the approach of other scholars in the field of judicial politics and the death penalty. This will lend support to the objective of this research, which is to confirm the hypothesis that there is the influence of

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[214] *Pratt and Another v. Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC and *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

judicial politics in the Privy Council decision making on the constitutionality of the death penalty in the Commonwealth Caribbean region.

CHAPTER TWO

LITERATURE REVIEW

In some regions of the world such as Europe, Asia and North America there has been a significant amount of literature surrounding the constitutionality and morality of the death penalty. These are noticeable both in the academic field and also more significantly in judicial opinions in constitutional appeal cases.[215] To complement these scholarly sources there are also some international instruments such as treaties, resolutions and in some cases directives from varying organisations and institutions that illustrate their doctrinal position on the death penalty.[216] Of notable importance is the United Nations *Resolution 61/199* calling for a worldwide moratorium on the death penalty.[217] Primarily it is proposed to present in this chapter, literature to understand and explain the policy decision of the Privy Council on the death penalty and its effect on the Commonwealth Caribbean.

In most instances the literature presented is reflective of the current thinking and debates on the death penalty. Most importantly, the literature identifies varying issues that affect the application of the death penalty in some regions. From an academic

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[215] Amnesty International Secretariat, *Death Penalty in the English-Speaking Caribbean A Human Rights Issue* (Amnesty International publications 2012); Amnesty International Secretariat, *Death Sentences and Executions in 2012* (Amnesty International Report: Amnesty International publications 2013) and William A. Schabas, *International Legal Aspects* (Capital Punishment Global Issues and Prospects, Waterside Press 1996).

[216] International Covenant on Civil and Political Rights (ICCPR) in 1976 and United Nation Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (United Nation December 10, 1984, 145 UN.T.S. 85 [entered into force June 26, 1987].

[217] United Nations Commission on Human Rights, *Resolution 61/199* (United Nations Department of Public Information New York 28th April 1999).

standpoint there has been an illustration of two images of the picture presented in the literature. On the one hand they focus on those in support of the death penalty and on the other hand there are those who are against it.[218]

Therefore, literature on the classical scientific theory will be explored in order to present an understanding of law, justice and policy. In this regard it provides a literary discourse on the subject matter mainly from a Commonwealth Caribbean perspective. The aim here is an attempt at understanding the death penalty phenomenon in the Commonwealth Caribbean by examining both the historical and current thinking of the death penalty in the region.

It is in this vein that a review of literature will be approached and it is proposed to do so in two parts. The first part entails the placing of the death penalty articles and or the judicial reasoning in a light that is reflective of the researcher's analytic model of judicial politics in the Privy Council. That is to say in the context of the legal, institutional and attitudinal models.

The second part compares how different theories and models were used in order to illustrate the issue of the death penalty in the Commonwealth Caribbean. In essence this review of literature on the death penalty would entail giving a summation of the author's research reflective of the legal, institutional and attitudinal theories and

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[218] Fred Phillips, *The Death Penalty and Human Rights* (The Caribbean Law Publishing Company an imprint of Ian Randle Publishers Kingston Jamaica 2009) 1 – 100.

models. This necessitates reviewing the work of other researchers and also comparing their researches to the present project.[219]

There are two goals to be achieved from approaching the review in this manner. The first goal in reviewing the literature relevant to the topic is to demonstrate familiarity with the body of existing knowledge on the death penalty. This would be from the Commonwealth Caribbean perspective. To some extent this will establish the credibility in the present research project in terms of original knowledge in the subject area.

The second goal to be achieved from this review is to learn from other researchers in order to understand their thinking on the death penalty in the Commonwealth Caribbean, and to some extent to put forward a new idea on this subject.[220] That new research idea suggest that the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics in the Privy Council.

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[219] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 96.

[220] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 97.

2.1: Policy Decisions in the Privy Council

In this regard *Feeley and Rubin* asserted that the Supreme Court resembles other policymaking bodies in the way they fashion rules and codes of conduct.[221] In their assertion they argued that policy making is a standard and legitimate function of modern courts. This said standard is generally achieved through well-accepted fact-finding or through interpretation of the Constitution or authoritative texts.[222]

Such is an illustration of the nature of this research. It is indeed a research of the Privy Council, a unique policy decision-making institution for the Commonwealth Caribbean jurisdiction based on Commonwealth appeals. *Amaral-Garcia, and Garoupa* further emphasised that, Commonwealth appeals are from Commonwealth jurisdictions and the vast majority of such appeal cases are disposed by the Privy Council.[223]

In order to understand the Privy Council Commonwealth Caribbean jurisdiction and its significance as a policymaking institution it is necessary to explore its origin.[224] The Privy Council is one of the oldest parts of the United Kingdom's constitutional

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[221] Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy-making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press 1998) 145 - 203.

[222] Ibid.

[223] Sofia Amaral-Garcia, and Nuno Garoupa, *Judicial Behaviour and Devolution at the Privy Council* (German Institute for Economic Research, DIW Discussion Paper No. 1643 2017) 1 – 43 at 2.

[224] Michael Everett, *The Privy Council* (House of Commons Briefing Paper, No. CBP 7460 2016) 1 – 14.

arrangements, with its origins dating back to at least the thirteenth century[225] and it is the effective court of last resort for the British Empire that is part of the Commonwealth.[226] It is also the final judicial body, which makes up the justice system in some countries such as the Republic of Trinidad and Tobago and Jamaica. It also sits in the United Kingdom and most of all it is an inheritance from colonial times.[227]

The Judicial Committee of the Privy Council is an institution which has often been misunderstood. Such a misconception stems from the fact that most lay persons very often refer to this body as the Privy Council. *Mohr* said that the Judicial Committee of the Privy Council is usually called by its shorter, although not entirely accurate, name the Privy Council.[228] This means that it is a myth for one to describe this judicial body as the Privy Council although it is a fact that the Privy Council is associated with this judicial body.[229]

In fact the Privy Council is an ancient institution within the United Kingdom and it is endowed with the authority to formalise certain government functions.[230] Today it

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[225] Michael Everett, *The Privy Council* (House of Commons Briefing Paper, No. CBP 7460 2016) 1 – 14 at 4.

[226] John de P. Wright, *The Judicial Committee of the Privy Council* (10 Green Bag 2D 2007) 373.

[227] Shantel A. McDonald, 'A True Sense of Independence: The Abolishment of United Kingdom's Influence Towards the Legal Affairs of The Commonwealth Caribbean,' (2015) 22 (1) *ILSA Journal of International Law* 133 – 159 at 133.

[228] Thomas Mohr, *A British Empire Court – A Brief Appraisal of the History of the Judicial Committee of the Privy Council* (Irish Academic Press Dublin Ireland 2011) 125 – 142 at 125.

[229] Ibid.

[230] Peter Burns, 'The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant?' (1984) Otago Law Review 503-520 at 503 - 506.

consists of over four hundred members who are appointed by the Queen of England on the advice of the Prime Minister. The members hold the distinction of being addressed as *The Right Honourable*. Over the years, it has become necessary for these members to meet when it is most appropriate to formally approve policies in the presence of the Sovereign. These policies can also be approved in the absence of the Sovereign but this is done in the presence of a Counsel of State.[231]

In order to ensure the efficiency or smooth functioning of the Privy Council, various committees are set up at different intervals to manage the wide range of issues, which will inevitably develop.[232] One such committee is the Judicial Committee of the Privy Council.[233] This Judicial Committee deals solely with final appeals in the Commonwealth Caribbean countries with the exception of the Cooperative Republic of Guyana,[234] Barbados[235] and more recently, Belize.[236]

This Committee consists of the Lord President of Council and other persons of high judicial office within the United Kingdom. It also includes leading members of the

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[231] James R. Walker, *English Legal System* (6th edn. London Butterworths 1985) 212 – 214.

[232] Ibid.

[233] Michael Everett, *The Privy Council. House of Commons Briefing Paper*, No. CBP 7460, (2016), pp. 1 – 14 and Thomas Mohr, *A British Empire Court – A Brief Appraisal of the History of the Judicial Committee of the Privy Council* (Irish Academic Press Dublin Ireland 2011) 125 – 142.

[234] Constitution (Amendment) Act of the Cooperative Republic of Guyana No. 19 of 1973, s 3.

[235] Constitution (Amendment) Act of Barbados 2003.

[236] Constitution (Seventh Amendment) Act of Belize 2010.

judiciary in Commonwealth countries.[237] *Barrett* in 2000 indicated that there are nine Privy Councillors who have been appointed from the ranks of foreign judges and are eligible to sit on the Judicial Committee.[238]

It should be noted that the Privy Council's central function is to act as the final appeal court of: (a) the British Overseas Territories (including those in the Caribbean, such as the Cayman Islands, but also others such as Gibraltar), (b) the Crown Dependencies and (c) certain Commonwealth states, now located solely in the Caribbean but until 2004 also including New Zealand. While it is true to say that in some cases the Privy Council hears certain appeals stemming from decisions of professional bodies within the United Kingdom, this institution is basically a Commonwealth Court.[239]

There are some Commonwealth nations which have achieved Republican status and have severed political ties with the United Kingdom but they continue to use the Judicial Committee as their final appellate body.[240] One such Commonwealth nation is the Republic of Trinidad and Tobago, which gained Republican status in 1976 and

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[237]Denis Keenan, *English Law* (8th edn. Pitman Publishing Ltd. 1986) 38 – 39.

[238] Maxwell Barrett, *The Law Lords: The Judicial Committee of the Privy Council* (Palgrave Macmillan UK 2000) 158 – 173 at 159 indicated that: ("at the time of writing this book there are nine Privy Councillors who have been appointed from the ranks of foreign judges and are eligible to sit on the Judicial Committee. Six of them come from New Zealand, one from Jamaica, one from the Bahamas, and one from the West Indies.").

[239] Margaret A. Burnham, 'Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean' (2005) 3 (5) Oxford University Press and New York University School of Law 582.

[240] Margaret A. Burnham, 'Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean' (2005) 3 (5) Oxford University Press and New York University School of Law 582 – 616 at 585.

which to date, accepts the Privy Council as its final judicial arbiter.[241] As a result of this, it can be represented that the Privy Council is one of the last bastions of colonialism which was effected through statutes[242] when Great Britain sought to expand, control and adjudicate in the British Empire.[243] Hence, it is still one of the indispensable legacies which remain in the Commonwealth Caribbean, although there have been numerous calls for its replacement.[244]

Le Sueur and Cornes in their research paper on what the top courts do, indicated that the role of such courts was that of hearing second appeals.[*245*] Therefore, the jurisdiction of the Privy Council is to hear appeals, both civil and criminal, in cases arising out of decisions made by the Court of Appeal in Commonwealth Caribbean countries.[246]

The ruling of the Privy Council is persuasive in some jurisdictions. Except for the ruling in appeals from courts in the Republic of Trinidad and Tobago,[247] the Privy

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[241] Constitution. Republic of Trinidad and Tobago, s. 109.

[242] Judicial Committee Act of the United Kingdom 1833 Chapter 41 3 And 4 Will 4 and Judicial Committee Act of the United Kingdom 1844 Public Acts 1844 C, 69 (Regional 7 and 8 vict).

[243] Loren P. Beth, 'The Judicial Committee as Constitutional Court for the British Empire 1833 -1971' (1977) 7(47) Georgia Journal of International and Comparative Law 56 -58.

[244] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993) 461 – 505.

[245]Andrew Le Sueur and Richard Cornes, What do the top courts do? 53 (Current Legal Problems Oxford University Press 2000) 1 – 42 at 38 said ("The formal function of the top courts is, and is likely to continue to be, that of hearing second appeals.").

[246] James R. Walker, *English Legal System,* (6th edn. London Butterworths 1985) 212 – 214.

[247] Constitution of the Republic of Trinidad and Tobago, s. 109.

Council never delivers a judgment but its rulings are in the form of an advice or an order given to Her Majesty, who informs the local Court of Appeal from which the appeal emanates.[248] When such an order is given by the Privy Council, it is very often done by three judges who sit to hear the appeal.[249]

However, there are instances, which may warrant the sitting of five judges as in *Pratt* case,[250] or nine judges as in *Matthew* case,[251] to hear and determine the appeal. Formerly, such an advice was unanimous but since 1966, the ruling of the Privy Council has been accepted on a majority basis. This allows for dissenting opinions to be given in accordance with the Judicial Committee (Dissenting Opinions) Order.[252]

It must be clearly noted that not all countries which were once governed by the British and which have subsequently achieved independence, still accept the Privy Council as their final court. This is because by virtue of the Statute of Westminster (1931), independent Commonwealth countries were afforded an opportunity to terminate appeals to the Privy Council.[253] A number of independent Commonwealth countries

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[248] James R. Walker, *English Legal System.* (6th edn. London Butterworths 1985) 213 – 214.

[249] Sofia Amaral-Garcia, and Nuno Garoupa, 'Judicial Behaviour and Devolution at the Privy Council' (*German Institute for Economic Research* Paper, No. 1643 DIW Discussion 2017) 1 – 43.

[250] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 343.

[251] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[252] Judicial Committee (Dissenting Opinions) Order 1966 (S. I. 1966 No. 1100).

[253] Statute of Westminster of the United Kingdom 1931. 22 GEO. 5. Ch.4.

such as the Cooperative Republic of Guyana,[254] Barbados[255] and Belize[256] have opted for the abrogation of appeals to the Privy Council. However, there are several countries in the Commonwealth Caribbean region including the Republic of Trinidad and Tobago[257] and Jamaica,[258] which have not yet relinquished the service of the Privy Council.

It is interesting to note that in September 2004, Jamaica's Parliament sought to dissolve its constitutional arrangement with the Privy Council by enacting three Acts. These Acts of Parliament were the Constitutional (Amendment) Act No. 20 of 2004, the Judicature (Appellate Jurisdiction Amendment) Act 2004 and the Caribbean Court of Justice Act 2004. The effect of those pieces of legislation was to abolish the right of appeals to the Privy Council and to substitute it with right of appeals to the Caribbean Court of Justice.

Despite the effort by that State to relinquish the Privy Council as its final court, there were challenges to the constitutionality of those Acts. Incidentally it was the very

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[254] Constitution (Amendment) Act of The Cooperative Republic of Guyana No. 19 of 1973, s. 3.

[255] Constitution (Amendment) Act of Barbados 2003.

[256] Constitution (Seventh Amendment) Act of Belize 2010.

[257] Constitution of the Republic of Trinidad and Tobago, s. 109.

[258] Constitution of Jamaica, s.110.

Privy Council which finally declared that the Acts were not enacted in the Jamaican Parliament according to the constitutional procedure, and were therefore void.[259]

In order for an appeal to be filed in the Privy Council, a request has to be made for leave to file such an appeal. This request commenced by way of a petition to the Crown and such a petition is made possible by the rule of practice, which exists under the Judicial Committee Act (1833).[260] Having made the petition, the Judicial Committee Act (1844) authorises the Queen by an Order in Council to admit any appeal to the Privy Council from any Court within the Commonwealth Caribbean.[261] This therefore means that the petition can be made even if the appeal does not originate from a Court of Appeal.[262]

The Privy Council, as it is today, is also an advisory body. It does not form part of the Supreme Court in some Commonwealth States although it is an integral part of their justice system. In the Commonwealth Caribbean, there is an abundance of evidence to show that the Privy Council gives advice on a wide range of issues. In this regard *Joseph* said that there is no higher calibre of judge in the common law world than their

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[259] *Independent Jamaica Council for Human Rights (1998) Limited and others v Hon. Syringa Marshall-Burnett and another* [2006] 1WLR 1623, PC.

[260] Judicial Committee Act of the United Kingdom 1833 Chapter 41 3 And 4 Will 4.

[261] Judicial Committee Act of the United Kingdom 1844 Public Acts 1844 C, 69 (Regional 7 and 8 vict).

[262] James R. Walker, *English Legal System* (6th edn. London Butterworths 1985) 213.

Lordships in the Privy Council and this is a good reason for retaining Privy Council in appeal matters so that we can avail ourselves of their expertise.[263]

As recently as July 1985 an advice was given on whether the Privy Council had jurisdiction to hear an appeal from Grenada. This issue arose out of the infamous case of *Mitchell and another v. Director of Public Prosecutions for Grenada and another*.[264] In that case, the appellants petitioned the Privy Council for special leave to appeal against the sentence of death which was imposed upon them by the High Court of Grenada and confirmed by that country's Court of Appeal.

In a brief look at the facts of that case which gave rise to the said petition, one would find the issues very intriguing. Some of the petitioners were members of the People's Revolutionary Government, which gained office in Grenada following the 1979 coup in that country. Subsequent to the taking of office, the then government passed the People's Law (1979), the effect of whose provision was made in Section 2 (1) for the abolition of appeals to the Privy Council.

Subsequently, the People's Law, Interim Government Proclamations and Ordinances, Confirmation of Validity Act No. 1 of 1985 was enacted in Grenada. The effect of its provision was to validate all the laws of the People's Revolutionary Government, the

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[263] Philip Joseph, 'Towards Abolition of Privy Council Appeals: The Judicial Committee and The Bill of Rights' (1985) 2 Canterbury Law Review, 273 – 297 at 296.

[264] *Mitchell and another v Director of Public Prosecutions for Grenada and another* [1985] 32 WIR 241, PC.

Resolutions of the interim government and the Orders of the Governor General. Some members of that group were eventually convicted of murder and sentenced to death, following which they sought to challenge the constitutionality of the said People's Law (1979). The Privy Council quite rightly advised that they did not have the jurisdiction to even hear the petition for the special leave and this was on the basis of the interpretation of the People's Law, Interim Government Proclamations and Ordinances, Confirmation of Validity Act No. 1 of 1985 Act.[265]

While this case is interesting as far as its facts are concerned, the point to note is that the Privy Council does not exist only to give judicial rulings as a final judicial institution for the Commonwealth Caribbean States but it also gives advice that is sought on any judicial issue and in this case, in its own jurisdiction to hear and preside over a matter. This is interesting from a Commonwealth Caribbean perspective since, although the Grenada People's Law No. 84 of 1979 made it clear that that country had abolished appeals to the Privy Council, it still took advice from that body to determine the constitutionality of the legislation.[266]

The Commonwealth Caribbean States have openly expressed their intention to abolish appeals to the Privy Council.[267] One signal in that direction occurred in January 1997

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[265] People's Law, Interim Government Proclamations and Ordinances, Confirmation of Validity Act No. 1 of 1985.

[266] *Mitchell and another v Director of Public Prosecutions for Grenada and another* [1985] 32 WIR 241, PC and People's Law, Interim Government Proclamations and Ordinances, Confirmation of Validity Act No. 1 of 1985.

[267] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993) 461 – 505.

when a special meeting comprising representatives of fourteen Caribbean countries was convened in the Republic of Trinidad and Tobago. These countries, including Guyana, Barbados, Jamaica, the British Virgin Islands, Dominica and Saint Kitts and Nevis had as the main topic on their agenda, the intention to put an end to appeals from this region to the Privy Council.[268]

The participants of that meeting faced no difficulties in deciding that a Caribbean Court of Appeal should be the established institution to be used as an alternative to the Privy Council in this region. The establishment of an alternative to the Privy Council by the Commonwealth Caribbean nations could be a significant blow to the future of the Privy Council as an appellate institution.[269]

A survey conducted by the ANSA McAL Psychological Research Centre of The University of the West Indies, St. Augustine Campus, Trinidad (1994-1999) provides excellent secondary data on the issue of the replacement of the Privy Council as the final Court of Appeal and the data shows significant public support for the abolition of appeals to the Privy Council. Further, the data also indicates that in 1994 there was a forty nine percent support for the replacement whereas in 1999 the figure rose significantly to sixty one percent.[270]

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[268] Hugh A. Rawlins, *The Caribbean Court of Justice: The History and Analysis of Debate* (The CARICOM Secretariat Georgetown Guyana 2000) 25.

[269] Hugh A. Rawlins, *The Caribbean Court of Justice: The History and Analysis of Debate* (The CARICOM Secretariat Georgetown Guyana 2000) 25 - 29.

[270] Ramesh Deosaran, 'Crime, Justice and Politics in Trinidad and Tobago: Trends and Analysis 1994-1999' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 87 - 91.

Clearly, there is general support for the replacement of the Privy Council across the Commonwealth Caribbean and there is the need for the region itself to have its own final Court of Appeal.[271] This is based on the premise that there is the dichotomy of the Privy Council decisions on the issues of the constitutionality of the death penalty in the Commonwealth Caribbean. According to the survey the public in the region voiced their disagreement with the Privy Council five-year limitation to carry out executions. In 1994 the 96% of the persons poled in this survey in Trinidad and Tobago supported the death penalty for a person convicted of murder and this was despite the objections by international human rights bodies.[272]

An important issue in this research is concerning the basis upon which the judges of the Privy Council construct their decisions on the death penalty. Lord Haldane illustrated quite accurately this basis in an address to the Cambridge Law Society in November 1921 on the topic: *'The work for the Empire of the Judicial Committee of the Privy Council.'*[273] It should be noted that this address also encompasses the ideals of this research. In that address Lord Haldane argued that the primary role of the Privy Council is a legal one and more specifically a judicial role whereas its ancillary role is a political one. In the said speech he suggested that the application of these roles

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[271] Ramesh Deosaran, 'Crime, Justice and Politics in Trinidad and Tobago: Trends and Analysis 1994-1999' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 87 - 91.

[272] Ramesh Deosaran, 'Crime, Justice and Politics in Trinidad and Tobago: Trends and Analysis 1994-1999' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 87 - 108.

[273]Jonas-Sébastien Beaudry, 'The Empire's Sentinels: The Privy Council's Quest to Balance Idealism and Pragmatism' (2013) 1(1) Birkbeck Law Review 15 – 61.

will present a higher principle of justice. However, *Beaudry* suggests that the principle of higher justice will be expressed through an institution rather than a set of rules.[274] Whereas *Gillman* suggests that appellate court decision-making is incontrovertibly influenced by a judge's ideology and political identity.[275]

It is proposed in this research to analyse data on the Privy Council constitutional decisions to present an understanding of how it arrives at a principle of higher justice. In this regard *Posner* takes this argument further by identifying factors of judicial decision makings such as judge's political preferences, personal characteristics and personal and professional experiences.[276] Thus by extension, judicial decisions partially revolve around the interest of justices rather than the court itself. *Armstrong* added that the social and psychological origins of judicial decision is really judicial attitudes that exhibit the influence of individual predilections on the development of law.[277]

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[274] Jonas-Sébastien Beaudry, 'The Empire's Sentinels: The Privy Council's Quest to Balance Idealism and Pragmatism' (2013) 1(1) Birkbeck Law Review 15 – 61 at 19 – 20.

[275] Howard Gillman, 'Regime Politics, Jurisprudential Regimes, and Unenumerated Rights' (2006) Journal of Constitutional Law 107 – 119 at 113.

[276] Richard A. Posner, *How Judges Think* (Harvard University Press Cambridge Massachusetts 2008) 8 indicates: ("scholars have found that many judicial decisions, by no means limited to the Supreme Court, are strongly influenced by a judge's political preferences or by other extra-legal factors, such as the judge's personal characteristics and personal and professional experiences, which may shape his political preferences or operate directly on his response to a case. … Legalism drives most judicial decisions, though generally they are less important ones for the development of legal doctrine or the impact on society.").

[277] Walter P. Armstrong, 'The Roosevelt Court: A Study in Judicial Politics and Values, 1937 – 1947' by Herman Pritchett, (1949) 24 Indiana Law Journal 308 – 319 at 310.

Clearly this demonstrates that the development of law is partially based on the ideological preferences of the institutional actors. *Yates and Coggins* suggest that it was the Justices' ideological inclinations that essentially drive in judicial decision-making.[278] It seems from an analysis of the position taken by *Yates and Coggins*, they are suggesting that theories of precedent, original intent and judicial ideology are three factors that have been the driving force in judicial decision-making.[279] In essence such is the nature of the present research. It is proposed to apply those factors in the current research in order to present a better understanding of the legal, institutional and attitudinal models used by Justices of the Privy Council in the Commonwealth constitutional decisions on the death penalty.

2.1.1: The Concepts of the Legal Model: Death Penalty Characteristics

***Retributive Theory*:** It is proposed to apply the retributive theoretical approach to the legal model research framework to illustrate this perspective which has been exhibited by the Privy Council. *Aboluwodi* in a research on this theory indicated that there is the notion that the retributive punishment is usually associated with the idea of retaliation.[280] On the other hand, *Beccaria*' advocates a rethinking of this prevailing

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[278] Jeff Yates, and Elizabeth Coggins, 'The Intersection of Judicial Attitudes and Litigant Selection Theories; Explaining U.S. Supreme Court Decision-Making' (2009) 29 (263) Journal of Law and Policy 263 – 299 at 265 suggested: ("while precedent and original intent may inform the Justices, these factors do not fully explain the decisions of the court – it is the Justices' ideological inclinations that essentially drive decision-making.").

[279] Ibid.

[280] Akinjide Aboluwodi, A Critical Analysis of Retributive Punishment as a Discipline Measure in Nigeria's Public Secondary Schools, (2015) 6 (10) Journal of Education and Practice 134 – 142 at 1 indicated: ("The notion of retributive punishment is usually associated with the idea of retaliation. It is a justification for an act committed by an individual or groups who by their actions have broken certain rules considered to be fundamental to the existence of their group, association or society.").

concepts of law and justice in his study.[281] Theoretically he indicated that punishment should be based on retributive reasoning because the guilty person had attacked another individual's rights.[282]

This classical theoretical perspective which advocated retribution is reflective on making the punishment fit for the crime committed. In essence this idea is based on the criminal law concept of just desert. The effect of this concept is that sanctions should be commensurate with the nature of the wrongfulness of the act. In this research it epitomises the application of the legal model towards the mandatory death penalty in the Commonwealth Caribbean. The term legal model is described by *Epstein and Walker* in terms of *positivist jurisprudence*. This model or theory centres on the assumption that judicial decision making revolves around judges adhering to the rule of law.[283]

Moreover, *Epstein and Walker* also labelled the legal model as *mechanical jurisprudence* because of the highly structured process by which judges reach their decisions.[284] However, some scholars on judicial behaviour have been arguing that the legal model is a term that is ill-defined in political science. In addition, it is important

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[281] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 29.

[282] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[283] Lee Epstein, and Thomas G. Walker, 'Positive Political Theory and the Study of U.S Supreme Court Decision Making: Understanding the Sex Discrimination Cases' (1996) 1(155) New York City Law Review 155 – 201 at 155 - 158.

[284] Ibid.

that judges interpreted the law correctly and in deciding cases the judges are guided by rules that lead them to the single correct answer.

In this regard *Posner* posited that legalists using this approach generally apply pre-existing rules in deciding cases.[285] This would suggest that the legal model concept presents judicial decisions without judicial discretion. Referencing the legal model, *Segal, and Spaeth* in their writing on the Supreme Court said that the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers and/or precedents.[286]

In view of the legal model approach there has been a strong element of ambivalence referencing its application to the death penalty law in the Commonwealth Caribbean. However, it is necessary to incorporate the death penalty law into the analysis of the legal model of judicial behaviour to illustrate the impact that this model has on the death penalty as a punishment.

Accordingly, *Harrington* discussed the involvement of foreign courts and quasi-judicial international tribunals in limiting the actual use of the death penalty in the

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[285] Richard A. Posner, *How Judges Think* (Harvard University Press Cambridge, Massachusetts 2008) 1 – 15 at 7 – 8 posited: ("Legalists decide cases by applying pre-existing rules or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as "legal analogy." They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts – mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) – for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique. Some legalists are even suspicious of precedents as a source of law, because it is infected by judicial creativity.").

[286] Jeffrey A. Segal, and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press New York 2002) 48.

Caribbean due to the rising crime situation in the region. Thus, *Harrington* indicated that the death penalty is a subject that invariably elicits passionate comment in the Commonwealth Caribbean which is witnessing rising rates of violent crime.[287] In this regard the main issue which creates international attention and passionate comments is the constitutional significance of the mandatory nature of death penalty as the punishment for murder.

In the Privy Council the issue of the mandatory death penalty was earlier argued as being unconstitutional in the Singapore case *Ong Ah Chuan v Public Prosecutor.*[288] However, Lord Diplock in the Privy Council in rejecting the argument against the mandatory nature of the death penalty, said that there was nothing unusual in a capital sentence being mandatory and that its efficacy as a deterrent might be to some extent diminished if it were not. Naturally this is an instance of the unwavering application of the legal model by the Privy Council.[289]

There was a comprehensive research on *'The Death Penalty in Trinidad and Tobago'* by the Prescott Commission of Enquiry. The specific aim of that enquiry was to determine whether the death penalty should be retained for any offence or offences

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[287] Joanna Harrington, 'The Challenge To the mandatory Death Penalty in the Commonwealth Caribbean' (2011) 98 (126) The American Journal of International Law 125 – 140 at 126 indicates: ("The death penalty is a subject that … invariably elicits passionate comment. Such comment is particularly so within the states that make up the Commonwealth Caribbean, where rising rates of violent crime have led to strong public clamour for a swift and final response.").

[288] *Ong Ah Chuan v Public Prosecutor* [1980] 3 WLR 855, PC.

[289] *Ibid.*

under the criminal law. After holding public enquiries and engaging in much deliberation, the Commission submitted its report on September 27, 1990.[290]

It is evident from the review that the Prescott Commission relies heavily on the public's comments and written submissions to explain the death penalty in the Republic of Trinidad and Tobago. In essence, the Commission's theory seems to suggest that the death penalty was accepted as a just punishment, when it articulated the legal approach or model that the law and the legal system should reinforce the main objective of protecting society and preserving the peace.[291]

This theory of just punishment was proffered in the Commission's recommendation and the evidence presented in the report suggests that the attitude of the public is in support of the retention of the death penalty law which was in existence. This measure of support was also subscribed to by the members of the Commission. It seems that their objective for deeming the death penalty appropriate was to ensure the protection of the society. Moreover, the mere presence of this punishment in the penal code has made this objective achievable.[292]

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[290] Elton Prescott, *The Death Penalty in Trinidad and Tobago* (Commission of Enquiry into the Death Penalty in Trinidad and Tobago Government Printer Port of Spain 1990) 1 - 59.

[291] Elton Prescott, *The Death Penalty in Trinidad and Tobago* (Commission of Enquiry into the Death Penalty in Trinidad and Tobago Government Printer Port of Spain 1990) 1 – 59 at 22.

[292] *Ong Ah Chuan v Public Prosecutor* [1980] 3 WLR 855, PC.

It is clear that the Commission's research was skewed towards the theory of just punishment or theory of retribution. The evidence indicates that the Commission was in favour of the resumption of the carrying out of the death penalty. This should follow after the legal remedies of each death row inmate have been exhausted. However, a significant feature of the report was one of the Commission's recommendations which stated that a prisoner, who was sentenced to death for more than ten years prior to the submission of the report, should have that death sentence commuted to life imprisonment.[293]

This recommendation seems to be diametrically opposed to the Commission's theory of just punishment, the objective of which is geared towards the protection of society. Such a critical discrepancy between this Commission's recommendation of life imprisonment for persons sentenced to death for ten years or more and its support for the death penalty seem conflicting.[294]

In summary it seems, that the objectives of the Commission have been achieved given their research mandate. However, their research method was based strongly on theoretical assessment of public opinion on the death penalty and the evaluation of secondary data. Thus, the enquiry of the death penalty by the Commission lacks depth in terms of evaluation of judicial opinion to scientifically present criminal justice

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[293] Elton Prescott, *The Death Penalty in Trinidad and Tobago* (Commission of Enquiry into the Death Penalty in Trinidad and Tobago Government Printer Port of Spain 1990) 1 - 59.

[294] Ibid.

explanations for the death penalty given the theoretical reasons advanced in the report for the retention of this punishment.[295]

The discrepancy outlined in that report has paved the way for further research on the death penalty in the region. It is proposed that this present research would remedy the identifiable deficiency. It would explore the death penalty in the region in order to evaluate and assess the judicial behaviour of the Privy Council towards it.

It is worth noting that *McIntosh* in his article considers whether the death penalty shows respect for human value. This literature explains that the legal theory, in terms of the death penalty, is a just punishment. In this article he postulates that a theory of just punishment must essentially be in the nature of a retributive theory of punishment since the argument for retribution is in essence a moral argument.[296]

It is clear that this author has adopted both a historical and a theoretical style during his presentation on the development of the theory. He traces the historical development of the death penalty by presenting a moral standpoint and linking it with the academic standpoint. These include, comparative reflection of the literary work of Shakespeare and the government's legislative policy.[297]

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[295] Elton Prescott, *The Death Penalty in Trinidad and Tobago* (Commission of Enquiry into the Death Penalty in Trinidad and Tobago Government Printer Port of Spain 1990) 1 - 59.

[296] Simeon C. R. McIntosh, 'Fundamental Rights, Governance and the Death Penalty' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 97.

[297] Ibid.

In dealing with the moral aspect of punishment the evidence presented, suggested that any punishment that reduce the individual to a terrified, defecating, urinating, screaming animal is cruel and inhumane and unjust.[298] *McIntosh* also suggested that this scenario would render that punishment a violation of humanity. However, he went on to point out that the death penalty was not inhumane, but what is seemingly inhumane is the method of execution that is, the process of hanging by the neck until death.[299]

McIntosh then presented academic evidence to substantiate this argument. Here he was able to link the moral argument in the project with three events in time. These include the academic literary work of Shakespeare, the system of execution in the pre-independence in Jamaica and the system of execution in England. The moral and academic evidence he presented indicated that the death penalty was the appropriate punishment for persons convicted of murder since it was accepted with or without the concept of delay. [300]

Clearly, he was of the view that although the character of the death penalty through the process of hanging is cruel, it was considered by the western society as a just form of punishment. Reference was made to the earlier acceptance of western society of

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[298] Simeon C. R. McIntosh, 'Fundamental Rights, Governance and the Death Penalty' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 98.

[299] Simeon C. R. McIntosh, 'Fundamental Rights, Governance and the Death Penalty' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 97.

[300] Ibid.

the death penalty through the process of hanging as a just form of punishment and that the death penalty is not inhumane. These arguments would demonstrate the legality of the death penalty since it was based on the retributive theory of just punishment. [301]

The use of this theory clearly exhibits the author's attitude towards the death penalty which to him seems to be an ethical issue. In this regard he proceeded to link his perspective to a retributive theory of punishment. He supported this linkage with Murphy's work on retribution.[302]

In summary it is worth noting that *McIntosh* in his article suggests that the death penalty is indeed a moral one and should not be used for the benefit of others. Clearly this literature validates the credibility of the theoretical concept in the present research which indicates that the death penalty as a punishment should not be used as a benefit to anyone. It is also a reflection of a perspective of *Beccaria's* theory of society that indicated that punishment must be a certainty, inflicted quickly, and should not be administered to set example; neither should it be concerned with reforming the offender.[303] Moreover, it would be in this light that it is proposed to conduct further research evaluation on the judicial perspective to better understand and explain the Privy Council's ideology on the constitutionality of the death penalty.

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[301] Simeon C. R. McIntosh, 'Fundamental Rights, Governance and the Death Penalty' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 98.

[302] Simeon C. R. McIntosh, 'Fundamental Rights, Governance and the Death Penalty' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 97.

[303] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

In November 2000, the Ministry of the Attorney General and Legal Affairs in the Republic of Trinidad and Tobago published a booklet on *'Implementing the Death Penalty in Trinidad and Tobago.'* It details the struggle that Trinidad and Tobago encountered with the Privy Council in its bid to carry out the death penalty. It also gives recognition to the theory of retribution or just dessert by suggesting that capital punishment, the lawful infliction of death as a punishment, has been part of the Trinidad and Tobago criminal justice system from its beginning.[304]

Thus, the purpose of the review is to show the development of this theory by evaluating the major documentary contribution to the issue of the death penalty in the Republic of Trinidad and Tobago for the period 1995 to 2000. This focuses principally on identifying with the death penalty laws in the Republic of Trinidad and Tobago. In so doing it was advanced that the death penalty is a mandatory punishment authorised by the law of the Republic of Trinidad and Tobago. It also signals that this punishment is prescribed for persons guilty of the crime of murder.[305]

Space was allocated in the said booklet to address the recommendations of the *Prescott Commission of Enquiry into the Death Penalty* in the Republic of Trinidad and Tobago. Time was also spent exploring judicial reasoning on the death penalty. The

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[304] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000) 1.

[305] Offences Against the Person Act of Trinidad and Tobago Chapter 11: 08, s. 4.

booklet focuses on addressing both the legal and socio-legal aspects of the death penalty in the Republic of Trinidad and Tobago.[306]

In this booklet the impact of the *Pratt* decision[307] on the death penalty in the Republic of Trinidad and Tobago was also addressed. The first and obvious implication is intrinsic to the law. That is, the decision facilitates the change of the law on delay in the execution of the death penalty from thenceforth. The evidence suggests that prior to this ruling, the law on delay in carrying out the death penalty was stated in the *De Freitas* case.[308] The situation in that case was that any delay between sentence and date carded for execution could not render the death penalty unconstitutional.[309]

The evidence presented would suggest that the opposite is now true. This is due to the *Pratt* case[310] which determined that it is now unconstitutional to carry out the death sentence where there was a delay of five years or more between the date of sentence and the date scheduled for execution.[311]

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[306] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000).

[307] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[308] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[309] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000).

[310] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[311] *Ibid.*

In order to meet the challenges created by the *Pratt* case[312] there were changes in the policies of the government to satisfy the requirements in the ruling. The changes embrace both legislative and administrative reforms. Those changes were geared towards getting rid of delay within the system of the judiciary and at the same time facilitating the carrying out of the death penalty.[313]

This booklet also illustrates the challenges experienced in the Republic of Trinidad and Tobago following the decision in *Pratt* case,[*314*] the political will of the then government to enforce the death penalty as a crime fighting tool and the response that would ensure the implementation of the death penalty. Thus, the assumption of judicial politics and its correlation to the death penalty in the Commonwealth Caribbean is not only credible but real.[315]

Such is the influence of the *Pratt* ruling,[316] the reform of the State judicial and administrative process and the signal of the actual execution of persons or of the warrants read to others for their execution. In other words, whatever legislative and policy changes that were implemented towards the death penalty came as a result of

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[312] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[313] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000).

[314] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[315] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000).

[316] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

the judicial politics concept which was featured in the *Pratt* case.[317] It was not because of any initiative taken independently by any Commonwealth Caribbean State to abolish or restrict the death penalty outside of judicial opinion.

This approach has demonstrated that the death penalty has evolved into a disparate specialist field within the field of criminal justice. It certainly subscribes to the theoretical concept of this research dealing with the constitutionality of the death penalty. It also addressed the concept that suggests that the death penalty must be consistent with the current debate within contemporary jurisprudence. Moreover, the representation adopted by the Ministry of the Attorney General and Legal Affairs suggests that the presentation is of practical significance to this research.[318]

Further, it demonstrates the measurable value that it is plausible that the death penalty in the Republic of Trinidad and Tobago is influenced by judicial politics. However, the major weakness of this project is that it is not of any major scientific contribution to knowledge. On that basis alone there would be the need for research to explore and evaluate the death penalty in terms of judicial politics. It is instructive to note that this position will be achieved through the present research.

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[317] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[318] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000).

In a critique of the application of the doctrine of retribution to the death penalty, *Gibbs* indicated that a host of critics have condemned retribution as barbaric.[319] A similar criticism was made by Ban Ki-moon, the former United Nations Secretary-General who said that the death penalty has no place in the 21st century.[320] In addition, *Mohammadu Buhari*, then President of Nigeria's criticism of the retributive perspective of the death penalty was more pronounced as he opined that it does not aim at any meaningful restorative justice.[321]

As recent as 2007, the Ministry of National Security published its Final Report on the Public Consultations on Crime in the Republic of Trinidad and Tobago. The consultations took place in seven communities in that country during the period April 18, 2007 to May 18, 2007. The primary objective of those consultations was for the government to share with the public its strategies in the fight against crime.[322]

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[319] Jack P. Gibbs, 'The Death penalty, Retribution and Penal Policy' *The* (1978) 69 (3) Journal of Criminal Law and Criminology 291 – 299 at 291 indicated that ("To be sure, a host of critics have condemned retribution as barbaric, thereby creating the impression that the doctrine is an anachronism.").

[320] Jack P. Gibbs, 'The Death penalty, Retribution and Penal Policy' *The* (1978) 69 (3) Journal of Criminal Law and Criminology 291 – 299 at 291 Ban Ki-moon, the former United Nations Secretary-General said: ("The right to life is the foundation of human rights. The taking of life is irreversible, and goes against our fundamental belief in the dignity and worth of every human being. I call on all world leaders, legislators and justice official to stop executions now. There is no place for the death penalty in the 21st century.").

[321] Mohammadu Buhari, *The Abolition of the Death Penalty in Nigeria: No Promises Yet*, (International Affairs Forum Spring, Centre for Democracy and Development, Abuja-Nigeria 2015) 2 – 29 at 28 opined that: ("The death penalty is retributive in nature. It does not aim at any meaningful restorative justice. In addition, challenges with our criminal justice system mean that some innocent individuals can easily be sentenced to death for crimes they did not commit. The death penalty does not aim at reconciliation and, in fact, encourages revenge.").

[322] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

Although the government as well as the general public was concerned with rising crime, in particular the murder rate, the government did not give a firm commitment on the implementation of the death penalty for persons convicted of murder. Four direct questions were asked by the general public throughout the consultations as to when the government will implement the death penalty as a strategy in the fight against crime.[323]

Unfortunately, there was no direct answer from the government and in particular the Prime Minister and the Minister of National Security to that issue. Instead, both in their responses placed the blame on the Privy Council for the government's failure in the implementation of the death penalty. Particularly, Mr. Patrick Manning, the then Prime Minister indicated that the Privy Council put one impediment after the next in the way of the execution of capital punishment in this country.[324]

Ironically, this statement is a clear validation from the government that the concept of judicial politics exists and it affects the application of the death penalty. In addition, this response has illustrated the plausibility of the research hypothesis of the influence

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[323] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

[324] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79 Mr. Patrick Manning the then Prime Minister indicated that: ("Capital punishment; that has been the subject of a lot of discussion in Trinidad and Tobago, and our inability to carry it out stems largely from the position adopted by the Privy Council. It has been particularly accentuated with the advent of Britain to the European Union and the attitude of the European Union to this whole question of capital punishment. The law lords in London, the Judicial Committee of the Privy Council which, as you know, is the highest court for Trinidad and Tobago, are taking the position that they put one impediment after the next in the way of the execution of capital punishment in this country.").

of judicial politics in the application of the death penalty as plausible because of the clear dichotomy between judicial politics, on the one hand, and the political intent of the government to retain the rule of law on the death penalty, on the other hand. Moreso this statement also illustrates the present research problem which engages the current legal analysis.

2.1.2: The Theories of the Institutional Model: Death Penalty Characteristics

Rational Choice Theory: It is proposed to align the rational choice theoretical approach with the institutional model research framework of the Privy Council on the death penalty. Writing on this theory *Lovett* described the rational choice theory as a set of tools that sometimes help social scientists in their efforts to understand and explain social phenomena.[325] Within this model the core assumption is that the rational choice perspective as enunciated by *Beccaria* suggested that the criminal is rational and that crime could be prevented through increased certainty, severity and celerity of the punishment.[326]

It should be noted that during the early 20th century it was clear that the legal doctrine of *stare decisis* was a determinant in the way judges of an institution operate. *Epstein and George* indicated that the core of the legalism model centres around a rather simple assumption that the legal doctrine, generated by past cases is the primary

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[325] Frank Lovett, *Rational Choice Theory and Explanation* (18 (2) Rationality and Society, Sage Publications, 2006) 237–272 at 265.

[326] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

determinant of case outcomes which is the doctrine of *stare decisis.*[327] *Knight and Epstein* defined the principle of *stare decisis* and illustrate its concept as the norm of judicial behaviour that structures judicial decisions making. In their theory they suggested that precedent might affect Supreme Court decision making in a number of ways.[328]

However, in recent history this concept of strategic modification becomes more apparent. It appears in the form of the legal doctrine of judicial politics which impacts on the Privy Council decisions on the constitutionality of the death penalty. Thus, the nature of the judicial politics framework which is presented and aptly described by *Lax* in terms of legal model versus attitudinal model is applicable to this research. This entails a reflection of a doctrinal-politics approach between a study of the attitudinal model of judicial behavior and the institutional model which is the actual legal practices of the Privy Council as an institution.[329]

In reviewing the literature for this section it was noticeable that there is no published regional work available that directly exhibits the Commonwealth Caribbean

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[327] Lee Epstein and Tracey E. George, 'On the Nature of Supreme Court Decision Making' (1992) American Political Science Review 323 – 337 at 324.

[328] Jack Knight, and Lee Epstein, 'The Norm of Stare Decisis' (1996) 40 (4) American Journal of Political Science 1018 – 1035 at 1018 indicated that: ("Precedent might affect Supreme Court decision making in a number of ways. One conception, the conventional view scrutinized by Segal and Spaeth, sees precedent as the primary reason why justices make the decisions that they do. A second regards precedent as a normative constraint on justices acting on their personal preferences. On this account, justices have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a norm favouring respect for precedent in order to produce a decision as close as possible to their preferred outcome.").

[329] Jeffery R. Lax, 'The New Judicial Politics of Legal Doctrine' (2011) 49 (11) Annual Review of Political Science, Columbia University 131 – 157.

perspectives on judicial politics in the Privy Council and the constitutionality of the death penalty. However, to some extent there are existing published works embracing other aspects that are relevant to the death penalty and which are largely in support of the research theory. That is to say, they suggest a correlation between the constitutionality of the death penalty and the influence of judicial politics.

It was further observed that to a large extent the body of literature on the death penalty in the region was pursued by *Ghany* and thus this aspect of the review would embrace some of his work in that field. One of his published articles that is of interest dealt with *'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean.'*[330] The evidence unearthed from this article indicates that it closely resembles the nature of the topic under research.

In that article, the author reserved a section to address the issue of the constitutionality of the death penalty which touched and concerned the Commonwealth Caribbean region. It is interesting to note, that from a contextual approach, the author, in this article took a historical journey of the death penalty commencing from the era of pre-independence, followed by the situation that presents itself at post-independence. In the article, he presented evidence to show that the death penalty was available in the Commonwealth Caribbean during the colonial era, a period when Great Britain was in occupation of the region. After the States in the region gained their independence

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[330] Hamid Ghany, 'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean' (1998) 3 (½) Caribbean Journal of Criminology and Social Psychology 116 – 134.

the death penalty law was retained. This was made possible through the saving provisions in their written Constitutions which saved all the existing laws.[331]

The article explains that the challenge to the law on the death penalty was brought about by the very post-independence constitutional provision that despises *cruel and unusual* punishment. In this regard, the author explored a series of constitutional cases from the pronouncement of the *De Freitas* case[332] where challenges to the death penalty were made on the basis that it was a cruel and unusual punishment. Other cases in that study include, the *Abbott* case,[333] the *Riley* case,[334] the *Pratt* case,[335] the *Guerra* case[336] and the *Henfield and Farrington* case.[337]

It was seen from the evidence presented in each of those cases that the Privy Council was only concerned with the issue of delay as a ground for declaring that the death penalty was unconstitutional. For instance, the Privy Council in the *De Freitas* case[338] did not declare that the death penalty was unconstitutional based on the issue of delay.

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[331] Hamid Ghany, 'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean' (1998) 3 (½) Caribbean Journal of Criminology and Social Psychology 116 – 134.

[332] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[333] *Abbott v Attorney General of Trinidad and Tobago and others* [1979] 1 WLR 1343, PC.

[334] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[335] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[336] *Guerra v Baptiste and others* [1995]4 All ER 583, PC.

[337] *Farrington v Minister of Public Safety and Immigration of The Bahamas* [1996] 49 WIR 1, PC.

[338] *De Freitas v Benny* [1975] 27 WIR 318, PC.

However, it was observed from the article, that the Privy Council left that issue of delay open for further analysis. It was also observed that the Privy Council did in fact accept such a proposition in the *Pratt* case,[339] a proposition which was further developed in the *Guerra*[340] *and Henfield and Farrington* cases.[341]

In the last paragraph of the article the author illustrates a variation in the manner in which the Privy Council addresses the issue of delay. That variation demonstrates a pattern of indifference by the Privy Council. It was further suggested that this institution had a hidden agenda in relation to the death penalty in the region. In fact, it was considered through its ruling that this institution has legislated against the death penalty in the region. It was surmised that the Privy Council's agenda was to capitalise on the issue of delay to make it difficult for the region to carry out the death penalty. Thus, the article concluded that there was a move by that institution to circumvent the powers of the Head of State to order the carrying out of the sentence of death.[342]

The review of this literature has shown a methodology that fails to adopt a research method to collect and adequately evaluate the qualitative data from a judicial standpoint on the death penalty in the region. This data will be significant in that it

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[339] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[340] *Guerra v Baptiste and others* [1995]4 All ER 583, PC.

[341] *Farrington v Minister of Public Safety and Immigration of The Bahamas [*1996] 49 WIR 1, PC.

[342] Hamid Ghany, 'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean*'* (1998) 3 (½) Caribbean Journal of Criminology and Social Psychology 116 – 134.

would define the judicial attitude towards this punishment which will put in context the illustrative information alluded to in the article.[343]

It was also observed that the method of analysis in this literature on the death penalty does not carry depth and is structured mainly around the content analysis data collection of constitutional matters evolving from the Privy Council. An in-depth evaluation of such data would most definitely put the qualitative information in the context of judicial politics. However, the failure of *Ghany* in the article to do so could be attributed to the lack of evidence on judicial politics which has demonstrated both the legitimacy and originality of the present exploration.

Moreover, the review of *Ghany's* literature on *'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean'* has provided a useful contextual point for this exploration of the topic. That is to say, the literature has reviewed the paradigm which addresses the constitutionality of the death penalty as a punishment in the Commonwealth Caribbean. It exhibited the theoretical perspective of the Privy Council in death penalty cases which is an essential aspect of this research. Moreover it demonstrates that the Privy Council approach is not based directly on the interpretation of the rule of law but on the makings of public policy.[344]

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[343] Hamid Ghany, 'The Privy Council and Judicial Indifference to Terrorism in the Commonwealth Caribbean*'* (1998) 3 (½) Caribbean Journal of Criminology and Social Psychology 116 – 134.

[344] Ibid.

Hatchard in the article on *'A question of humanity, delay and the death penalty in Commonwealth Courts'* explains the approach of that institution through an analysis of two landmark rulings by the said Privy Council.[345] They are the cases the *Catholic Commission For Justice and Peace*[346] and the *Pratt* decisions.[347] The decisions in both cases are unique for their time, but in this review focus will be made on that part of the article which addresses the *Pratt* issue of delay.[348] The purpose is to show the discussion on the issue of the judicial reasoning in death penalty cases for the region.

Hatchard considers the approach of the Privy Council on the issue of delay and in particular the setting of a clear rule for a State wishing to retain the death penalty. This aspect of the punishment he classified as being attractive. He suggested that the laying down of this specific rule may be inappropriate given the fact that national procedure and circumstances may vary within the regional States. An interesting aspect in this analysis is that it was suggested that the only remedy that should be available in a constitutional case where there was delay is an order terminating the delay.[349]

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[345] John Hatchard, 'A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts' (1994) Commonwealth Law Bulletin 309- 317.

[346] Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors 1993 (1) ZLR 242 (S) at 250 A-E.

[347] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[348] John Hatchard, 'A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts' (1994) Commonwealth Law Bulletin 309- 317.

[349] Ibid.

The summation of this article is indicative of the fact that not only was the approach of the Privy Council attractive but it has made inroads into the doctrine of parliamentary sovereignty. The evidence presented shows that the Privy Council usurped the role and function of Parliament when it made a specific rule of a five year time-limit for delay. In doing so, it has abdicated its own role as interpreter of the law and took on the mantle of a legislator. This is a leading indicator that the Privy Council has adopted public policy approaches and it deviated from following precedent and has entered the arena of the parliamentarian through the window of judicial politics.[350]

However, *Geyh* presents an opposing view of judicial decision making in terms of judicial independence. This to him revolves around the theme where judges decide matters according to law and not according to their own whims or external interference.[351] By following the law *Geyh* was also articulating the institutional model of judicial behaviour.[352] Thus, how else could he explain the decision in the *Pratt* case? From the analysis of the *Pratt* case[353] as illustrated in *Hatchard's* article, there is a presentation of the academic testimony on this issue of judicial politics.[354]

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[350] John Hatchard, 'A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts' (1994) Commonwealth Law Bulletin 309- 317.

[351] Charles Gardner Geyh, 'Can the Rule of Law Survive Judicial Politics' (2012) 97 (2) Cornell Law Review 191 – 254 at 217 postulated that ("Judges and courts defenders proceed from the categorical premise that judges do not make but follow the law. … In our system of government, we expect judges to rule according to the laws regardless of their personal views.").

[352] Ibid.

[353] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[354] John Hatchard, 'A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts' (1994) Commonwealth Law Bulletin 309- 317.

There is also the definite need for additional research to further evaluate illustrative evidence on this issue from a judicial standpoint. It is in this light that this aspect will be pursued in the present research to demonstrate and validate the researcher's analytic model of judicial politics.

Ghany's in the article *'The Guerra, Henfield and Farrington cases'*[355] raises the issue as to whether the *Pratt* ruling was refined or revised.[356] This literature illustrates the indifferent approach by the Privy Council on the issue of the death penalty. It was suggested that the indifferent approach was a hidden agenda on the part of the Privy Council. This literature also illustrated the refining and the revision of the *Pratt* ruling in the subsequent cases in order to shape the law on the death penalty as it related to delay.[357]

Ghany highlights the comment made by the then Chief Justice of the Republic of Trinidad and Tobago Mr. Michael de La Bastide on the issue of implementing the death penalty and was of the opinion that the Privy Council used the *Guerra* case[358] to refine the *Pratt* ruling.[359] In the *Guerra* case he claimed that the evidence suggested that the Privy Council invoke the two year rule for the local appellate process.

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[355] Hamid Ghany, 'The Guerra, Henfield and Farrington cases: Pratt and Morgan Refined or Revised?' (1997) 2 (1) Caribbean Journal of Criminology and Social Psychology 64 – 76.

[356] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[357] *Ibid.*

[358] *Guerra v Baptiste and others* [1995]4 All ER 583, PC.

[359] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

However, this was not relevant in *Pratt's* since in that case the five year rule was used to deem the delay in execution unconstitutional.

Ghany suggested that the Privy Council used the *Henfield and Farrington* cases to re-open the issue of prolonged delay, which was decided in the *Pratt* case in order to revise the rule of five years of delay between sentence and execution to three years and six months. This revision seemed to be necessary based on the context of the legal system in which the target period for appeals is two years.[360] Finally, he suggested that the Privy Council had made inroads into the doctrine of separation of powers by refusing to recognise section 80 (2) of the Constitution which is an ouster clause. That clause illustrates the separation of the duties of the executive from the duties of the judiciary.

In a summation of this literature, *Ghany* seemed to suggest that the Privy Council has allowed itself its own discretion to use its own rules when it sees it fit to do so. By applying this literature in this review it was gleaned that the Privy Council did not apply the law in its reasoning in the matter. This has been described as a dangerous signal for the region's justice system. Thus, this is a clear instance of the Privy Council developing on the issue of delay in execution for the sole purpose of bringing about the abolition of the death penalty.[361]

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[360] Hamid Ghany, 'The Guerra, Henfield and Farrington cases: Pratt and Morgan Refined or Revised?' (1997) 2 (1) Caribbean Journal of Criminology and Social Psychology 64 – 76.

[361] Ibid.

Ghany in another article on *'The Death Penalty, Human Rights and Law Lords: Judicial Opinion on Delay of Execution in the Commonwealth Caribbean,'* has suggested key constitutional issues relevant to the death penalty in the Commonwealth Caribbean.[362] Firstly, it underscores the historical relevance of the Privy Council whose purpose was identified as, to hear appeals from the British colonial jurisdictions. Secondly, it evaluates the position taken by the Privy Council on the issue of the constitutionality of the death penalty in the Commonwealth Caribbean. Finally, it provides a chronological assessment of the issue of delay in carrying out execution in the region from the *De Freitas* case[363] to the *Farrington* case.[364]

The evidence presented suggests that the death penalty remains the punishment for murder in the region primarily because the constitutional provision saved it as an existing law after independence.[365] It was seen that the very Constitution has supplied provisions to challenge the death penalty as a punishment that is cruel and unusual and a violation of the human rights of the individual. However, it was indicated in the *De Freitas* case that the executive act of carrying out the death penalty was not unconstitutional.[366]

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[362] Hamid Ghany, 'The Death Penalty, Human Rights and Law Lords: Judicial Opinion on Delay of Execution in the Commonwealth Caribbean,' *(*2000) 4 (2) International Journal of Human Rights 30 – 43.

[363] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[364] *Farrington v Minister of Public Safety and Immigration of The Bahamas* [1996] 49 WIR 1, PC.

[365] Hamid Ghany, 'The Death Penalty, Human Rights and Law Lords: Judicial Opinion on Delay of Execution in the Commonwealth Caribbean,' *(*2000) 4 (2) International Journal of Human Rights 30 – 43.

[366] *De Freitas v Benny* [1975] 27 WIR 318, PC.

In focusing on the issue of delay in carrying out the sentence of death, *Ghany* looked at a line of cases from the *De Freitas* case[367] to the *Farrington* case[368] and indicated that in all instances the Privy Council was not consistent with its ruling. The evidence that has been presented demonstrates that the policy of the Privy Council towards the death penalty in the Commonwealth Caribbean has changed within the period of those two decided cases. For instance, in the *Abbott* case the author explained that the Privy Council determined the issue of delay based on months, but left open the said issue as it relates to years. Further, it allows the local judges the opportunity to determine what constitutes reasonable time for dealing with a petition.[369]

However, it was suggested in the *Pratt* case that the Privy Council viewed the delay in excess of five years as unconstitutional.[370] The author also evaluated the *Guerra* case to identify with other patterns of inconsistency where the Privy Council held that the delay of four years and ten months was also unconstitutional.[371]

Against all these indifferences of the approaches of the Privy Council, the author suggests that it seems that this judicial body has an agenda against the death penalty for the Commonwealth Caribbean. This can be concluded since it has virtually legislated, through the use of judicial opinion, an activity which is described in this

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[367] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[368] *Farrington v Minister of Public Safety and Immigration of The Bahamas [*1996] 49 WIR 1, PC.

[369] *Abbott v Attorney General of Trinidad and Tobago and others,* [1979] 1 WLR 1343, PC.

[370] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[371] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

research as judicial politics. The author's presentation is very attractive since it shows that there is need for further research to understand and present an explanation of the indifferent approaches of the Privy Council towards the death penalty. This will be facilitated in this present research as it necessitates the obtaining of further illustrative information in relation to the death penalty in the region. Given the indifferent approaches stated above, the qualitative evidence will validate as credible, the theoretical perspective that the Privy Council decisions on death penalty are influenced by judicial politics.

2.1.3: The Theories of the Attitudinal Model: Death Penalty Characteristics

Social Choice Theory: It is proposed to apply the Social Choice Theory approach in the attitudinal model research framework. In this scenario the social choice theory entails the study and or analysis of collective decision making processes and procedures which concerns with the individual judicial inputs and or preferences of justices relative to judgments that are defined in the collective outputs of the collective judicial decision making.[372] Thus, the attitudinal model clearly describes the social theoretical perspective of which *Beccaria* suggested that it is better to prevent crimes than to punish them.[373]

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[372] Roger B. Myerson, *Fundamentals of Social Choice Theory* (Economics Dept., University of Chicago, January 8, 2013) 1-32.

[373] Liqun Cao, Major Criminological Theories (Wadworth/Thompson Learning Belmont, California 2004) 30 Beccaria suggested that ("The aim of a very good system of legislation was the prevention of crime. It is better to prevent crimes than to punish them…. Every punishment which is not soundly based upon absolute necessity was tyrannical and that the more cruel and severe the punishment, the more the minds of men grew hardened and calloused.").

One of the key areas of this research revolves around the attitudinal model of judicial behaviour. Accordingly *Epstein and Walker* indicate that the attitudinal model is based on sociological jurisprudence.[374] This model epitomises a mechanism by which the judges of the Privy Council have adopted social factors to construct their decisions. *Bailey and Maltzman* said that qualitatively, one can explain most Court decisions in terms of either policy or legal motivation.[375] In similar fashion, *Segal, and Spaeth* describe the attitudinal approach as one form of policy motivation of the court. They suggest that policy preferences of this model holds that the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices.[376]

In this research the attitudinal model of judicial behaviour is operationalised through constitutional appeal cases and legal documents on the death penalty. In a six-member Commission of Enquiry into Prison conditions, chaired by the then Anglican Bishop, Clive Abdulah, between 1972 and 1980 in the Republic of Trinidad and Tobago, the Commission in its final published report included a chapter on capital punishment.[377]

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[374] Lee Epstein, and Thomas G. Walker, 'Positive Political Theory and the Study of U.S Supreme Court Decision Making: Understanding the Sex Discrimination Cases' (1996) 1(155) New York City Law Review 155 – 201 at pp. 157 – 163.

[375] Michael A. Bailey and Forrest Maltzman, 'Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court' (2008) 102(3) American Political Science Review 369.

[376] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press New York 2002) 48.

[377] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) 112 – 118.

It seems from the Commission that it had adopted the sociological theory of rehabilitation in its focus on the death penalty in the Republic of Trinidad and Tobago. This assumption was arrived at based on the Commission's pronouncement that we have gone beyond the stage of supporting the views: - 'a life for a life' and there can be no possibility of rehabilitating.[378]

In the development of this theory of rehabilitation it is apparent that the Commission did not spend much time in researching and presenting adequate information on the death penalty although the duration of its enquiry lasted two years. This is evident from the fact that there was no unanimity by the Commissioners in terms of the operationalization of the theory. It must be noted that in the final analysis, the Commission was unable to arrive at a single position on the death penalty.[379]

In summary, the Commission's report indicates that there was a split among their ranks on the use of the death penalty as the punishment in the Republic of Trinidad and Tobago for persons convicted of murder. The report revealed that the majority supported a limited scale of the use of the death penalty but would facilitate the

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[378] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) said: ("Hopefully, as a community, we have gone beyond the stage of supporting the views: - 'a life for a life' and since there can be no possibility of rehabilitating a person when so final an act as his execution takes place, we need to constantly bear in mind the kind of persons who have in fact been condemned to die for taking the life of another.").

[379] Ibid.

removal of some acts of killing such as crimes of passion, from the category that carries the death penalty.[380]

However, what is worth noting is the opinion of the Commission's minority members. They articulated that the death penalty should be abolished for a trial period of five years and that life imprisonment should be the punishment for persons convicted of murder during this period. This focus of the minority in the Abdulah Commission was, rather than adopting a novel position for the country, there should be an attempt to impose in the Republic of Trinidad and Tobago the cultural position of the United Kingdom.[381] This said position was adopted by that country in 1965 when it sought in the Parliament to address the issues on the death penalty as the punishment for murder through the Murder (Abolition of Death Penalty) Act of the United Kingdom, 1965.

The point to note is that the approach of the Commission presents an uncertainty of their position on the death penalty. On the one hand the majority was relying on a limited theory of retribution and a limited theory of rehabilitation whereas the minority on the other hand was relying totally on the theory of rehabilitation. In addition, it

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[380] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) said: ("Hopefully, as a community, we have gone beyond the stage of supporting the views: - 'a life for a life' and since there can be no possibility of rehabilitating a person when so final an act as his execution takes place, we need to constantly bear in mind the kind of persons who have in fact been condemned to die for taking the life of another.").

[381] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980).

seems that the Commission has adopted a comparative method in their enquiry. Thus the situation of the penal justice system in other countries was assessed and inspiration was drawn from them. That caused the Commission to conclude that the crime of murder should be categorized.[382]

Moreover, the Commission was in support of the rehabilitation of the prisoners rather than their execution based on the retributive theory of punishment. This is so even though it recognized that the gun-wielding burglar, who on being challenged shoots with intent to kill.[383]

In summary the method adopted by the Abdulah Commission in probing the use of the death penalty in the Republic of Trinidad and Tobago, together with the weakness of the members of the said Commission in arriving at a unanimous agreement on the death penalty has failed to bring settlement to the use of the death penalty.[384] This will be in terms of the theoretical concept that suggests the need for a high degree of certainty in the application of the death penalty and as such it has left the subject matter wide open for further enquiry. It is proposed to collect illustrative information in this

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[382] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980).

[383] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) 114 – 115 said: ("there has recently come on the scene, the gun-wielding burglar, who on being challenged or on meeting any resistance to his/her arms, shoots with intent to kill. Such offenders appear and will continue to appear in society, motivated into a life of crime as a result of socio-political factors, and therefore will not be deterred by the retention of the death penalty. Indeed, no penalty that the law may impose is likely to have any effect on their actions.").

[384] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) 1 – 59.

present research from the decisions of the Privy Council on the constitutionality of the death penalty to objectively assess and explain the concept of judicial politics.

In the third edition of his book '*The Death Penalty A Worldwide Perspective,'* Professor Roger Hood has allocated four pages in one of the book's Chapters which directly addresses the death penalty situation in the Commonwealth Caribbean.[385] Although limited in the amount of time spent on the regional perspective, in general the book itself represents a major contribution of the author's perspective on the death penalty. The aim of reviewing this literature here is to focus on the criticism levied at the legal approach of the death penalty in the Commonwealth Caribbean. To complement this, an assessment of the author's theoretical perspective has been made.

The Caribbean regional perspective on the death penalty would suggest a theory of just dessert. This is based on the need for the application of the death penalty in the region as the punishment for murder can be viewed in terms of public attitude. The evidence presented suggests that although most Caribbean States have not carried out executions in many years, they demonstrate a cultural preference for the death penalty, since no independent attempt has been made to abolish it through legislation. [386]

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[385] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 59 – 62.

[386] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 60 indicates that: ("In many of these island states execution would probably have been carried out more frequently had it not been for successful appeals to the Judicial Committee of the Privy Council and internationally aroused pressure. Thus despite the fact that many may at times appear to be abolitionist de facto, they have not in fact forsaken their attraction to capital punishment.").

In developing this theory, it was suggested by the author that the public's attitude shows strong support for the death penalty in the region. This is a definite indication that for the region the death penalty is accepted as the punishment for persons convicted of murder. However, it was also suggested that the region's failure in carrying out the death penalty has been the result of the attitude of the judiciary and also social choice of interest groups.[387]

A point to note is that *Hood's* recognition of the actions of the judiciary here is clearly a leading indicator of the presence of the social choice theory within the attitudinal model of judicial politics.[388] Naturally, *Hood* was not alone in this area. This position was also articulated by *Epstein, et al.*, in their writing on the *'Ideology and the Study of Judicial Behavior.'* In it they said that judges are attempting to maximize their ideological preferences by bringing the law in line with their own political commitments.[389]

In addition, *Hood* has also presented evidence of the high crime rate, a social problem that is endemic in the Commonwealth Caribbean, which has primarily frustrated the abolition of the death penalty or any government's consideration in bringing any such legislation to that effect in Parliament. This is indicative of the author's preference of

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[387] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 59 – 62.

[388] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 60.

[389] Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffery A. Segal, *Ideology and the Study of Judicial Behavior, Ideology, Psychology and Law.* (Oxford University Press 2012) 705 – 728 at 705.

the theoretical perspective of rehabilitation. In fact, he strengthens his preference when he indicates that the public's opinion in this region was very hostile towards any such government legislation given the high crime rate in the region.[390]

In conclusion, a review of *Hood's* final sentence on the Caribbean's perspective suggests a major support of the research theoretical perspective that deals with the death penalty in the region and also the author's perspective. In this regard he postulates that the region's avoidance of their international commitments is a clear indicator of their determination to resist abolition of capital punishment.[391]

This outlook confirms the view that neither the Executive nor the Legislature in the Commonwealth Caribbean States have sought to abolish the death penalty.[392] At this stage, compliments are hereby given to *Hood's* work on the death penalty as it relates to the Commonwealth Caribbean. When it is viewed in totality, it clearly demonstrates the culmination of years of research on the death penalty both in the Commonwealth Caribbean region and by extension worldwide.[393] However, there seems to be one major inadequacy with his research hypothesis and that is it has not evaluated the role

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[390] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 59 - 62.

[391] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 62 suggested that ("The decision of Jamaica, Guyana, and Trinidad and Tobago to try to avoid their international commitments to abide by rulings of the UN Human Rights Committee under the ICCPR, and by Trinidad's withdrawal from the American Convention on Human rights, is a clear indicator of their determination to resist abolition of capital punishment.").

[392] Ibid.

[393] Hood, Roger and Florence Seemungal, *A Rare and Arbitrary Fate. Conviction for Murder, the Death Penalty and the Reality of Homicide in Trinidad and Tobago* (European Commission and Foreign and Commonwealth Office 2006).

played by the judiciary in death penalty matters.[394] It is proposed to do so in this research by obtaining documentary evidence which when evaluated will confirm the research hypothesis as being reliable since it would be un-biased and scientifically objective.

2.2: Models of Decision-making in the Caribbean Court of Justice and the Death Penalty Characteristics

The Caribbean Court of Justice was established on February 14, 2001 to be the final judicial institution in the region when the agreement establishing it was signed.[395] As at the time of the writing up of this thesis this court is the final appeal court for three Commonwealth Caribbean countries. Those countries which replaced the Privy Council with the Caribbean Court of Justice are the Cooperative Republic of Guyana in 2005,[396] Barbados in 2005[397] and most recently Belize in 2010.[398] That court was inaugurated on April 16, 2005 at its geographical location in the Republic of Trinidad and Tobago.[399]

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[394] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 62.

[395] Caribbean Community (CARICOM) Secretariat, *Agreement Establishing The Caribbean Court of Justice* (Caribbean Community Georgetown Guyana 2001).

[396] Caribbean Court of Justice Act of Guyana No. 16 of 2004.

[397] Caribbean Court of Justice Act of Barbados 2003.

[398] Caribbean Court of Justice Act of Belize 2010.

[399] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993) and Caribbean Community (CARICOM) Secretariat, *Agreement Establishing The Caribbean Court of Justice* (Caribbean Community Georgetown Guyana 2001).

It is clear from an assessment of the issues in the jurisprudence emanating above that the Privy Council demonstrates that it is adequately protecting the rights of the citizens in the region. However, there are patterns of inconsistency in treating with the issues concerning the constitutionality of the death penalty in the region. The point to note is that the Privy Council sought to give effect to the human rights and values declared and entrenched in the Constitution of Caribbean countries. This has made it difficult, if not impossible, for the region to satisfy the legal criteria set down by the said Privy Council for the implementation of the death penalty when these criteria change with every new case which is brought before the said Privy Council.[400]

The point worthy of note is that the Caribbean Community felt a sense of usurpation of their rights of self-determination by the policy and approach of the Privy Council towards the death penalty. Further, it was proffered that the Privy Council does not reflect the general sensibilities, culture and feelings of justice in the region. In fact it is of great distance from the region and its policies and judgments are made miles away. This led to much disenfranchisement among the nations in the Commonwealth Caribbean.[401]

There was a need for something more Caribbean, something which is in touch with the wants, needs, mentality and overall spirit of the Caribbean. Justice Telford

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[400] *Pratt and Another v. Attorney General for Jamaica and Another.* [1993] 43 WIR. 340, PC and *Farrington v. Minister of Public Safety and Immigration of The Bahamas,* [1996] 49 WIR. 1 PC.

[401] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

Georges of Dominica recognised this need for regionalism when he said that it was a compromise of sovereignty for the regional states to leave their judicial decision to a court, which is part of the former colonial hierarchy, a court which in the appointment of its members, the regional states have no say.[402] The idea of a Caribbean court to counter the approach of the Privy Council was born and fostered as the replacement for the Privy Council.[403]

Having such an institution will be beneficial to the region in a number of ways. This was alluded to by Professor Francis Jacobs, a Privy Councillor and former Advocate General of the European Court of Justice. In essence he claims that all possible steps should be taken to encourage the States in the Caribbean to accept the jurisdiction of their own supreme court.[404]

It is clear that Jacobs embraces local values and developing a modern jurisprudence as the main reasons for the establishment of the court.[405] This could be viewed as an

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[402] Hugh A. Rawlins, *The Caribbean Court of Justice: The History and Analysis of Debate* (The CARICOM Secretariat Georgetown Guyana 2000) recognised that ("An independent country should assume responsibility for providing a court of its own choosing for the final determination of legal disputes arising from decision in the country. It is a compromise of sovereignty to leave that decision to a court, which is part of the former colonial hierarchy, a court in the appointment of whose members we have no say.").

[403] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

[404] Francis Jacob, The State of International Economic Law: Re-Thinking Sovereignty in Europe, (2008). II (I) Journal of International Economic Law 5 – 41 claims that ("A supreme court of high calibre has been established in the Caribbean which would be able to take account of local values and develop a modern jurisprudence in an international context. It is regrettable those political difficulties have obstructed acceptance of its jurisdiction and that the outdated jurisdiction of the Judicial Committee of the Privy Council survives, in often bizarre detail, for many of those States. All possible steps should be taken to encourage the Caribbean States to accept the jurisdiction of their own supreme court.").

[405] Ibid.

enormous task as against a comparative assessment with the present functions of the Privy Council.[406]

It is important to note that the Law Lords of the Privy Council are both geographically and culturally removed from the Commonwealth Caribbean experience. They are not fully equipped with the knowledge and level of understanding required to make policy decisions which reflect their sensitivity for the Commonwealth Caribbean people. This proximity factor was attributed to the Privy Council following the decision in the *Pratt* case[407] and also more recently following the decision in the *Roodal* case.[408]

Moreover, it has been advanced that the Caribbean Court of Justice will foster a greater sense of security and stability in the region. Acting in its original jurisdiction, the Caribbean Court of Justice will be the only Court responsible for the interpretation and application of the Treaty Establishing the Caribbean Community 1973.[409] This will eliminate the possibility of conflicting decisions coming from other Courts which are lacking in geographical and cultural proximity.[410]

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[406] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

[407] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[408] *Roodal v The State of Trinidad and Tobago,* [2004] 2 WLR 652, PC.

[409] Caribbean Community (CARICOM) Secretariat. 1973. Treaty establishing the Caribbean Community. Chaguramas: Trinidad.

[410] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993) and Caribbean Community (CARICOM) Secretariat, *Agreement Establishing The Caribbean Court of Justice* (Caribbean Community Georgetown Guyana 2001).

In addition, the Caribbean Court of Justice acting in its original jurisdiction will also be responsible for hearing and deciding on issues arising between the Commonwealth Caribbean States following the establishment of the Caribbean Single Market and Economy (CSME). This proposition was well articulated by *Eidson* who indicated that one of the explicit reasons which led to the creation of the Caribbean Court of Justice was the need for a court to deal with the proliferating commercial disputes of the Caribbean Community and Common Market. This reason has reinforced the aspiration in the region of a desire to have a sense of self and not to be subjected to the dictates of the decisions made in Europe.[411]

It therefore means that decisions of this institution will facilitate the free movement of goods, services and skills within the region. This will help the member States and foreign investors to feel secure in the knowledge that there is one highly respected Court for ensuring fairness, proper observation of the rules by the member States and predictable decisions.[412] Finally, it has also been advanced that there are enough members of the legal profession possessing the requisite degree of skill and integrity to occupy positions within the Caribbean Court of Justice to deal with any legal matter and this includes dealing with matters involving the death penalty.[413]

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[411] Weston Eidson, *The Caribbean Court of Justice: An Institution Whose Time Has Come* (Chicago-Kent College of Law, 2008).

[412] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

[413] Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce (CCJ Appeal No. CV002 of 2005).

The establishment of the Caribbean Court of Justice was not done without much criticism. Persons in opposition to the court very often claim that the establishment of the Caribbean Court of Justice was a direct response to the ruling in the *Pratt* case.[414] It was suggested that the court was created to undo the constraints on the death penalty decreed by the Privy Council. It was further suggested that the court will primarily be a hanging Court.[415]

These assertions require some analysis of the background leading to the establishment of this judicial institution and also its approach in death penalty cases. From a historical perspective it was sheer coincidence that the *Pratt* case[416] was decided at that time. It is also a fact that interest in the Caribbean Court of Justice can be credited to the West Indian Commission Report and certainly not the *Pratt* case.[417]

This report recommended the establishment of a Caribbean Supreme Court which predated the decision in the *Pratt* case by one year.[418] The most compelling reason advocated in that report for having a regional supreme court was for the completion of the region's assumption of sovereignty. That is to have an appropriate and

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[414] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[415] Richard Small, *The Caribbean Court of Justice* (European Commission Foreign and Commonwealth Office 2005).

[416] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[417] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

[418] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

authoritative institution being able to interpret the Treaty Establishing the Caribbean Community.[419]

Writing in defence of the Caribbean Court of Justice and in relation to the issue that it is viewed as a "hanging court" the then Attorney General of Barbados Sir David Simmons debunked that notion.[420] However, Simmons was not singular in his strong support for the Caribbean Court of Justice. Dr. Kenny Anthony, then Prime Minister of St. Lucia also strongly disputed the notion that the Caribbean Court of Justice would be a hanging court. In an address to the Norman Manley Law School on June 28, 2003 on the Caribbean Court of Justice and the issue of it been a hanging court, *Anthony* said emphatically that courts in Commonwealth Caribbean legal system, do not hang people.[421]

The totality of this statement can support the premise that the Caribbean Court of Justice is independent of government and its political influence. This attribute is

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[419] Caribbean Community (CARICOM). 1973. Treaty establishing the Caribbean Community. Chaguramas: Trinidad.

[420] David Simmons, 'The Caribbean Court of Justice: Where are we now?' (1999) Caribbean Journal of Criminology and Social Psychology, said: ("I feel bound to make that point because November 1993 was the date of the Privy Council's decision in the case of Pratt and Morgan. I am also bound to say that the debate on the Caribbean Supreme Court has become distorted by opponents of such a court who seek to convey the impression that the impetus to set up the court springs from a desire to accelerate hangings in the region. Nothing could be further from the truth. In fact, it is a positively dangerous and unbecoming argument in that it implies that the judges of the Caribbean Court of Justice will approach their judicial functions consumed by prejudice and bias. The true reasons for the establishment of an indigenous final court are far loftier and rooted in those rational and psychological factors of which I spoke and, indeed, the realities of the regional integration process itself.").

[421] Kenny Anthony, 'The Caribbean Court of Justice: Will It Be A Hanging Court' (Speech delivered at to the Norman Manley Law School, June 28, 2003) said: ("Courts in our legal system, do not hang people. It is our Parliaments, which choose to retain the death penalty as a punishment for the crime of murder, and not our Courts.").

credited to the manner by which judges are appointed to that regional institution, the tenure of office of the judges and the financial provisions for the court.[422] It should be noted that Judges of the Caribbean Court of Justice are appointed by a Regional, Judicial and Legal Services Commission, a body that is independent of political influence and established by Article V (1) of the Agreement Establishing the Caribbean Court of Justice. The Commission itself has a well-defined institutional arrangement that has removed any political discomfort in the process of appointment of judges.[423]

It comprises eleven members chosen from representatives of regional bar associations, civil society and academic institutions which are totally independent of political influence and of which the President of the Court is the Chairman. This composition ensured that the judges are not directly appointed by member States and the significance here will be that the regional governments will not be in a position to exert any informal pressure on the court to deliver a self-serving judgement.[424] This is a clear indifference in the manner in which judges of the Privy Council are appointed. The appointment of the judges of the Privy Council can be described as political appointees since they are appointed by the Queen on the advice of the Prime Minister.[425]

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[422] Caribbean Community (CARICOM) Secretariat, *Agreement Establishing The Caribbean Court of Justice* (Caribbean Community Georgetown Guyana 2001).

[423] Ibid.

[424] Ibid.

[425] O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law,* (7th ed. Sweet and Maxwell 1987).

Appointments of this nature are indeed vulnerable to political manipulation. Evidence of this appeared when the Lord Chancellor's multiple functions drew public criticism in February 2001 when it emerged that the then holder of this office, Lord Irvine, had invited a number of leading lawyers to make donations to the Labour Party. Although there was no known suggestion that Lord Irvine would have allowed any such donation or its absence, to influence his appointments of Queen Counsels or judges, or any decision he might make when sitting judicially, it was felt that the situation showed all too clearly the paradox of having an active politician in this case the Lord Chancellor, as head of the judiciary.[426]

Since that time, the United Kingdom Supreme Court was inaugurated on October 1, 2009 with the Lord Chief Justice at its helm. The position of Lord Chancellor has been joined with the cabinet position of Secretary of State for Justice. It therefore means that the Lord Chancellor is now confined only to the Cabinet in the United Kingdom.[427]

In addition, the judges of the Caribbean Court of Justice have security of tenure. They retire at the age of seventy-two years with a possible extension of three years on request. In addition, the court is funded by a Trust Fund of one hundred million dollars United States of America Currency which is managed by a Board of Trustees. These

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[426] Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing Portland Oregon USA 2002).

[427] Constitutional Reform Act of the United Kingdom 2005.

administrative intricacies have insulated the court from any interference be it political or otherwise which ensure that the court is totally independent.[428]

The main reasons advanced for establishing the Caribbean Court of Justice was presented in a statement made by *McIntosh,* who indicated that the establishment of a Caribbean final court of appeal to replace the British Privy Council must be seen as an essential part of constitutional reform.[429] One can glean from that position that there is the need for the supremacy of the Constitution in the region. However, from an evaluation of the major statements on the establishment of the Caribbean Court of Justice there seem to be two primary reasons for the establishment of that court. The first, entails the completion of the region's assumption of sovereignty and secondly, for developing or reshaping a true Caribbean Jurisprudence.[430]

As regards the issue of assumption of sovereignty in the region, *Morrison* made a very important revelation. He proclaims that the Privy Council is an affront to sovereignty and as such it is inconsistent with independence.*"*[431] This would suggest that the need has arisen for the Caribbean people to take charge of their own affairs, and to assert

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[428] Caribbean Community (CARICOM) Secretariat, *Agreement Establishing The Caribbean Court of Justice* (Caribbean Community Georgetown Guyana 2001).

[429] Simeon C. R. McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Ian Randle Publishers Kingston Jamaica 2002) said: ("the establishment of a Caribbean final court of appeal to replace the British Privy Council must be seen as an essential part of constitutional reform; a critical final step in the process of making our Constitution our own.").

[430] Ibid.

[431] Dennis Morrison, 'Caribbean Legal Affairs: The Judicial Committee of the Privy Council and The Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism' (2006) 30 Nova Law Review 403.

their rights to full constitutional sovereignty. That is, to have a regional institution in the form of the Caribbean Court of Justice being able to interpret the laws in the region.[432]

In so doing this court will most definitely embark on its own agenda to develop and reshape the Caribbean jurisprudence. This entails deciding constitutional matters on behalf of the people in the Caribbean. The court will also write the region's jurisprudence on nationality and political identity. This will bring about the clarification, expansion and or modification of pre-existing laws in the region but it does not necessarily mean that it would abolish precedents.[433]

This benefit was realised in the case, *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v. Joseph and Boyce*.[434] That case was decided on Wednesday November 8, 2006 in the Caribbean Court of Justice. This was the Court's first judgement on the death penalty and it certainly requires some contextual evaluation. Incidentally, it is a judgment based on the due process of the law on the death penalty in Barbados. In its judgement the Caribbean Court of Justice ruled that the Barbados Government had infringed the constitutional rights of the two condemned prisoners Jeffery Joseph and Lennox Ricardo Boyce. It then stated that to

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[432] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

[433] Leonard Birdsong, 'The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean' (2005) University of Miami Inter – American Law Review 198 – 227 at 225.

[434] *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce* (CCJ Appeal No. CV002 of 2005).

execute them would be unconstitutional and it confirmed the Barbados Court of Appeal's decision in commuting the death sentence of the respondents to life imprisonment.

However, that decision provides illustrative evidence to demonstrate that the Caribbean Court of Justice can by comparison, perform as efficiently as the Privy Council in dealing with matters of due process of the law and equal protection for all. In that case the Caribbean Court of Justice was asked to restore the death penalty for the two respondents. This section would be incomplete without the procedural history and the factual background of the *Joseph and Boyce* case and its decision being told.

On April 10, 1999 the respondents and two others were accused of the murder of Marquelle Hippolyte. On February 2, 2001 the respondents were found guilty and sentenced to death for the said murder. On March 27, 2002 their appeal to the Barbados Court of Appeal was dismissed. On June 24, 2002 the Barbados Privy Council met and advised against the commutation of the death sentences. On June 26, 2002 death warrants were read to both men for their execution. The said day the High Court of Barbados granted a stay of the execution pending an appeal. On July 7, 2004 the Privy Council by a 5 to 4 majority dismissed their appeal and upheld the death sentence.

On September 3, 2004 Joseph and Boyce filed an application before the Inter-American Commission on Human Rights for a declaration that their rights under the American Convention on Human rights were violated. On September 13, 2004 the

Barbados Privy Council met and advised the Governor General that the death sentences of Joseph and Boyce should be carried out. On September 15, 2004 the death warrants were read to Joseph and Boyce for their execution on September 21, 2004. On September 16, 2004 Joseph and Boyce filed a motion before the High Court seeking commutation of their death sentences.

On September 17, 2004 the Inter-American Court issued a provisional order requiring Barbados to preserve the lives of Joseph and Boyce pending the outcome of their petition. On December 22, 2004 the High Court of Barbados dismissed the motion filed before it on September 16, 2004. On January 18, 2005 an appeal was filed to the Barbados Court of Appeal. On May 31, 2005 the Barbados Court of Appeal allowed the appeal and commuted the death sentences of Joseph and Boyce to life imprisonment.

Subsequently, the Barbados government filed an appeal to the Caribbean Court of Justice for an order to reinstate the death sentence on Joseph and Boyce. On June 20 and 21, 2006 the appeal was heard before the Caribbean Court of Justice and on November 8, 2006 the Caribbean Court of Justice dismissed the Barbados government's appeal for an order to reinstate the death sentence on Joseph and Boyce and in the process delivered its opinion.

The court's decision demonstrates that the notion of the court being conceived as a hanging court is a myth. In this case, that issue has received the attention of the court and it took some time in the judgment to explain its purpose as a regional institution.

That is to promote the development of a Caribbean jurisprudence.[435] This is a strong indication of the approach of the Caribbean Court of Justice in death penalty matters. Quite naturally it has clearly put to rest the notion that the court was established as a hanging court. In fact, *Cross* writing on the *Joseph and Boyce* case express the view that the mandatory death penalty Commonwealth Caribbean has evolved due to judicial erosion coupled with an impressive human rights trend in the region.[436]

The point to note here is that the court has made it abundantly clear in the *Joseph and Boyce* case that its purpose is to promote the development of a Caribbean jurisprudence.[437] This is an aspect which was also alluded to in the West Indian Commission Report as the reason for the establishing of the Caribbean Court of Justice.[438]

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[435] *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce* (CCJ Appeal No. CV002 of 2005) the Caribbean Court of Justice said: ("The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall consider very carefully and respectfully the opinion of the final courts of other Commonwealth countries and particularly, the judgements of the JCPC which determine the law for those Caribbean States that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeal came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly, we reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados.").

[436] Jane E. Cross, 'A Matter of Discretion: The De Facto Abolition of the Mandatory Death Penalty in Barbados – A Study of the Boyce and Joseph Cases' (2014) 46 (1) Inter-American Law Review 39 – 59 at 39 indicates that ("In the last twenty years, the mandatory death penalty ("MDP") in the Commonwealth Caribbean has evolved due to recurrent scrutiny at the national and regional levels. While undoubtedly the judicial erosion of the MDP marks an impressive human rights trend in the region, the trajectory of this change has been complex and frequently discussed.").

[437] *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce* (CCJ Appeal No. CV002 of 2005).

[438] Shridath Ramphal, *Time For Action: Report of the West Indian Commission* (The West Indian Commission Mona Jamaica 1993).

Even more significantly is the fact that the court in its judgement iterated its position with regards to previous decisions of the Privy Council. It informed that in developing a Caribbean jurisprudence it will respect the previous judgement of the Privy Council unless there is some material irregularity. That material irregularity identified with the area where a written law states otherwise, or to put it simply, is in the case where there is conflict with the Privy Council's judgement and legislation. This clearly is an expression of the validation of previous judicial politics since in essence the Court was saying that it was not prepared to overrule any of the previous judgements of the Privy Council unless legislation has dictated that it should do so. Moreover, it exhibited the ideology that the Caribbean jurisprudence cannot be developed in isolation without taking into account other regional jurisprudence.[439]

In light of the fact that the Court in its first judgement waded into the thinking of its detractors and provided clear and unambiguous responses to the myths of describing the court as a hanging court. The most appropriate assessment that can be made here has been that the illustrative evidence thus far has presented sufficient qualitative justifications for the establishment of the Caribbean Court of Justice to replace the Privy Council. It also presents the perception of the adoptionist approach of the Court's on the notion of judicial politics towards the death penalty.[440]

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[439] *Attorney General of Barbados, Superintendent of Prisons and the Chief Marshal v Joseph and Boyce* (CCJ Appeal No. CV002 of 2005).

[440] *Ibid.*

Thus, the judgement demonstrates that the Caribbean Court of Justice would not adopt any major different approach to the death penalty when compared with that of the Privy Council. In this regard, *Birdsong* in the article on the formation of the Caribbean Court of Justice demonstrates it quite succinctly by indicating that it is unlikely that a court with a common law could or would abandon the constitutional requirements previously ruled upon by the Privy Council.[441] This position therefore, embraces the justification or the rational for this research.

2.3: The Rationale for this Research

Niblett and Yoon suggest that the existing literature has consistently found, across a wide array of specifications, that judicial ideology affects case outcomes.[442] It is with this approach in mind that the relation of judicial politics and the constitutionality of the death penalty presents the rationale for this research to demonstrate an understanding of judicial behaviour. *Epp* on the other hand postulates that: *"Apart from judicial independence, the presence or absence of constitutional rights guarantees is widely believed to be the most important influence on the extent of judicial policy making on rights*."[443]

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[441] Leonard Birdsong, 'The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean' (2005) University of Miami Inter – American Law Review 198 – 227 at 225.

[442] Anthony Niblett and Albert H. Yoon, 'Friendly Precedent' (2016) 57 William and Mary Law Review 1789 – 1823 at 1818.

[443] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, Ltd., London 1998) 1- 247 at 11.

In this research consideration was given to the issue as to whether the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by judicial politics. *Ghany's* writing on the death penalty and the Judicial Committee of the Privy Council represents a major contribution on the death penalty in the Commonwealth Caribbean. The main purpose of this article was to show some fundamental misconceptions that the Privy Council has acted on as far as the local jurisdiction is concerned and it demonstrates a distinct correlation between the researcher's analytic model of judicial politics and the constitutionality of the death penalty in the Commonwealth Caribbean.[444]

It is for this reason a review of this literature was applicable in this area of the research. The focus of the author was to highlight the reality that the will of the Executive is being frustrated by the level of policy intention by the Privy Council. In this regard, the author presented evidence illustrating a balanced presentation of the many misconceptions of the Privy Council in relation to the death penalty in the region. For instance, the article intimated that the Privy Council was no longer concerned with the death penalty as the punishment for persons convicted of murder, but it focused more on the conditions surrounding the carrying out of the sentence. Those conditions include the delay as it relates to the court process and the policies of the Executive arm of the government.[445]

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[444] Hamid Ghany, 'The Death Penalty and the Judicial Committee of the Privy Council' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 108 – 119.

[445] Ibid.

The research method adopted in this article to present the evidence was the content analysis. This method entails the evaluation of constitutional cases such as the *De Freitas* case,[446] the *Riley* case,[447] the *Guerra* case[448] and the *Pratt* case.[449] It was found from an analysis of those cases that the approaches of the Privy Council were not in keeping with the culture, the spirit of the law and practice in the Commonwealth Caribbean.[450] Therefore, *Ghany* has shown that the Privy Council was seeking to impose the United Kingdom's standard on constitutional matters in the Commonwealth Caribbean when there is a cultural difference between both regions. One way of explaining this revelation of cultural diversity would be through the theory of social culture.[451]

However, in this research the theoretical perspective used to explain the approach of the Privy Council is through judicial politics. In 2005 in a Death Penalty Conference held in Barbados, Attorney-at-Law Douglas Mendes presented a paper which addressed saving lives by luck and chance, the saving law clauses and the persistence of arbitrariness. In summary that paper showed that the death penalty litigation in the region is associated with the term *creation* both for the judiciary and for the human

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[446] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[447] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[448] *Guerra v. Baptiste and others* [1995] 4 All ER 583, PC.

[449] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[450] Hamid Ghany, 'The Death Penalty and the Judicial Committee of the Privy Council' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 118.

[451] Hamid Ghany, 'The Death Penalty and the Judicial Committee of the Privy Council' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 108 – 119.

rights attorneys. This notion of *creation* in this paper substantiates this research exploration since it is a preliminary validation of the analytic theory of judicial politics presented in this research.[452]

Accordingly, *Mendes* describes the creativity in the judicial decision making as being dramatic since the judiciary was prepared to reverse itself in death penalty decisions.[453] He was at pains to outline a long string of such reversals undertaken by the Privy Council since the decision of the *De Freitas* case[454] through to the decision of the *Matthew* case.[455] These include the decision in the *Pratt* case[456] which reversed the decision in *Riley* case[457] (not to be subjected to a long delay in execution) and the *Matthew* case[458] which in turn reversed the abolition of the mandatory punishment of the death penalty in the *Roodal* case.[459]

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[452] Douglas. Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission, Foreign and Commonwealth Office 2005) 41 – 52.

[453] Ibid.

[454] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[455] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[456] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[457] *Riley and Others v Attorney General* [1982] 35 WIR 279, PC.

[458] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[459] *Roodal v The State of Trinidad and Tobago,* [2004] 2 WLR 652, PC.

Mendes describes the judicial changing of the parameter for the carrying out of the death penalty as one of luck and chance.[460] Thus, where lives have been saved as in the *Guerra* case,[461] to *Mendes*, this can be attributed to luck. On the other hand, where the persons were executed as in the case of Glen Ashby, Dole Chadee and Anthony Briggs, to him this can be deemed as unlucky. However, against this back drop, his paper fits squarely in his own reflection of Lord Hoffman's statement in *Lewis* case which warns against the sacrificing of precedent on the altar of personal philosophy.[462]

According to *Beim* because of the gravity of death penalty cases, higher courts are more likely to care about the outcome of the cases as much as the law in creation.[463] This suggests that *Mendes'* description of the events in the judiciary as *creation* is not only incomplete but it constitutes an inadequate way of representing the Privy Council's approach towards the death penalty in the region.

In effect such could be recognised as the judicial creation of exceptions whose impact restrict the implementation of the death penalty. Thus, it would have been better represented had *Mendes* categorized the artful *creation* operating within the judiciary as the operationalisation of the legal doctrine of judicial politics by the Privy Council

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[460] Douglas. Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission, Foreign and Commonwealth Office 2005) 41 – 52.

[461] *Guerra v Baptiste and others* [1995]4 All ER 583, PC.

[462] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[463] Deborah Beim, 'The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases' (2014) 76(4) Journal of Politics 1074-1088.

in deciding the constitutionality of the death penalty bearing in mind Lord Hoffman's doctrinal warning.[464]

The theoretical perspective of judicial politics was well articulated in the research theory presented therein. When *Mendes'* work is compared with it, there seems to be a demonstration of this type of judicial activity taking place in the Privy Council. This is apparent when it is deliberating on issues affecting the death penalty in the region.[465]

This judicial activity by the Privy Council is further pursued and addressed in this research exploration in the consideration given to the issue as to whether the death penalty in the Commonwealth Caribbean is influenced by judicial politics. Analysis of this issue is necessary to illustrate the correlation between judicial politics and the death penalty. However, from a preliminary assessment of the content of *Mendes'* literature, it seems to suggest that there can be a measure of confirmation that there is a direct correlation between the constitutionality of the death penalty and the influenced of judicial politics within the walls of the Privy Council.[466]

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[464] Douglas. Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission, Foreign and Commonwealth Office 2005) 41.

[465] Ibid.

[466] Douglas. Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission, Foreign and Commonwealth Office 2005) 41 - 52.

2.4: Conclusion

From the review of the literature presented in this chapter it is clear that there is insufficient research on the subject of judicial politics in the Privy Council and the constitutionality of the death penalty that is directly linked to the Commonwealth Caribbean. Although to a limited extent some studies were done in other areas on the death penalty however, the review suggests that there is no known research on the present topic in the region. This therefore means that the issue of correlation between judicial politics and the death penalty in this region is an unresolved research issue.

It is proposed to resolve this issue by pursuing with this exploration in judicial politics in three areas. The first will be a case law analysis of the nature of the death penalty in the Commonwealth Caribbean States which would be presented in chapter four of this research. The second would be a legal and textual analysis of the present state of knowledge on judicial politics and the constitutionality of the death penalty decided in the Privy Council which is presented in chapter five. The final area which is complimentary to the two areas above, will be an analysis of human rights issues which impact on the death penalty in the region to be presented in chapter six.

The research methodology and methods to pursue the exploration in these areas are presented in chapter three. This would be necessary in order to spell out the manner by which illustrative information would be obtained to validate the research theoretical perspectives. One methodological challenge foreseen is that the varying review on the literature produced insufficient data and or illustrative information regarding the nature of judicial politics in the region towards the death penalty. It is

this lack of data or illustrative information which will pose the difficulty in the making of a comparative analysis with the data or illustrative information to be collected in the present research. However, despite such a challenge, the process of qualitative data collection and analysis will not be stymied and will definitely be pursued herein.

Another challenge that would be faced in this exploration is the lack of literature directly relevant to the topic and more specifically reflective of the Commonwealth Caribbean perspective. While this deficiency can also be recognised as a positive attribute for treating with this present research as an original piece of work, this scarcity of direct literature will definitely support the need for this research since it is evident that more research is needed on this aspect of the death penalty. This research would not only increase our understanding of judicial behaviour in the Privy Council, but it would add to the stock of research on judicial politics and in this instance from a Commonwealth Caribbean perspective.

CHAPTER THREE

RESEARCH METHODOLOGY AND METHODS: A FRAMEWORK FOR THE ANALYSIS

3.1: Qualitative Research Methodology

The term methodology is a subfield of the science of epistemology. Epistemology is described as the science of knowing.[467] Methodology on the other hand is concerned with validating knowledge.[468] *Babbie* suggested that the science of methodology offers a special approach to the business of inquiry.[469] In effect he described this approach as the science of finding out.[470]

Writing on the said subject *Nachmias et al.,* indicate that a scientific methodology is a system of explicit rules and procedures upon which research is based and against which claims for knowledge are evaluated.[471] In effect methodology defines the scientific process, principles and the procedures that will be used to find answers to the issues raised in the research question.[472]

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[467] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company Belmont California1992) 18.

[468] Ibid.

[469] Ibid.

[470] Ibid.

[471] Chava Frankfort Nachmias and David Nachmias, *Research Methods in the Social Sciences* (5th edn. St. Martin's Press New York 1996) 13 – 23 at 13.

[472] Ibid.

There are several forms of epistemological research. However, the exploration into the research problem will be channelled and presented through a descriptive and interpretative qualitative methodology. This paradigm has its own ontological or nature of reality, epistemological and methodological assumptions, which would define the nature and direction of this research on the death penalty in the Commonwealth Caribbean.[473]

In essence, *Gangrade* literally defines the present research effort when he suggests that a descriptive study is a sort of fact-finding operation with adequate interpretation. It is in reality an exploratory or formulative study design which is pursued to gain familiarity with a phenomenon.[474] This therefore means that the use of the descriptive and interpretative qualitative methodology in this research is concerned with exploring the processes and approaches within this social phenomenon - on judicial politics in the Privy Council and the constitutionality of the death penalty in the Commonwealth Caribbean.

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[473] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company Belmont California) 1.

[474] K. D. Gangrade, 'Legal Research and Methodology' (2001) Journal of the Indian Law Institute 273 – 300 at 279 said: ("A descriptive study is a sort of a fact-finding operation with adequate interpretation. In descriptive studies some would like to include (a) exploratory or formulative studies designed to gain familiarity with a phenomenon or to achieve new insights into it, often in order to formulate a more precise research problem or to develop a hypothesis; studies (b) designed to portray accurately the characteristics of some phenomena, groups, individuals or organisations; and (c) studies designed to determine the frequency of the occurrence of an event so as to minimise bias and maximise reliability.").

Hagan has described the qualitative approach in similar terms to that of the classic sociologist Weber. He emphasised that researchers pursuing this activity would immerse themselves in the subject matter and develop *'sensitizing concepts'* that enhance their understanding and explanation of reality.[475] This activity is pursued and achieved in this research through the process of investigating, interpreting, understanding, describing and explaining the nature and the reality of the influence and consequences of the research concept.

It is for this reason that this qualitative methodological investigation is channelled through the classical criminology approach. This is in effect a research of society that suggests that people exercise free will in making decisions.[476] In this research there will be immersion in the data and or illustrative information so that embedded meanings and relationships can emerge. The concept for which explanation is sought in this qualitative research is, as *Hagan* suggests, understanding the reality under investigation.[477] In this research it is reflective of an understanding of the doctrine of judicial politics which is immersed in the Privy Council decisions as it relates to the constitutionality of the death penalty in the Commonwealth Caribbean.

The strategies used to carry out a collection of data through this methodology are the content analysis method, a secondary data analysis and evaluating research design.

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[475] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (6th edn. Boston Press 2003) 9 – 23 at 19.

[476] Ibid.

[477] Ibid.

Thus, this investigation will uncover the deeply embedded assumptions within the social phenomenon in order to understand the concept of judicial politics and validate its presence within the constitutionality of the death penalty. This will afford the opportunity to build findings to explain and respond to the research question.[478]

Since methodology is an attempt to collect accurate facts and data, then the use of the qualitative paradigm will be both essential and adequate in this exploration. This will be operationalised by following a traditional research model to define the nature, direction and consequence of the research into judicial politics and the death penalty.

It therefore means that this research would embody a combination of case law analysis into the death penalty in the region, legal and textual analysis of judicial decisions made by the Privy Council and an analysis of human rights issues that affect the death penalty in the region. *Leeuw,* writing on legal research, indicated that legal research is rooted in a diversity of disciplines, sub-disciplines and specialities some going back for centuries. Moreover, such disciplines include amongst other things law and politics and as such in this research the study of the death penalty and judicial politics are sub-discipline of law and politics. [479]

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[478] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company Belmont California 1992) 18.

[479] Frans L. Leeuw, 'Empirical Legal Research: The Gap between Facts and Values Legal Academic Training' (2015) Utrecht Law Review 19 – 33 at 21.

Therefore, this research pursued on the death penalty in the Commonwealth Caribbean region has utilized a qualitative methodology paradigm to find illustrative information in the research discipline. It was *Blume* and *Eisenberg* who indicated that strong anecdotal evidence suggests a relation between the politics of selection methods and the death penalty appeal outcomes.[480] Thus in this research there will be presentation of anecdotal evidence through the qualitative legal research paradigm. This will be done in three parts in order to capture the data and illustrative information necessary to complete this project on the case law analysis of the death penalty in the Commonwealth Caribbean, the legal and textual analysis of the judicial decisions on the death penalty in the Privy Council and also the analysis of human rights issues which impact on the death penalty in the region.[481]

3.1.1: A Case Law Analysis of the Death Penalty in the Commonwealth Caribbean

In this research project the case law analysis entails an analysis of the death penalty in the Commonwealth Caribbean from a policy perspective. This includes the examination of secondary data on the death penalty, the death penalty legislation, legal forms and stakeholder participation in the governance of the Commonwealth Caribbean society. Such data analysis will be presented in a descriptive format.

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[480] John H. Blume and Theodore Eisenberg, 'Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study' (1999) 72 (465) Southern California Law Review 465 – 503 at 465.

[481] Ibid.

Accordingly, *Yin* describes a study of this nature as one that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident.[482] The underlying idea for this case analysis is because a general legal research cannot provide a definitive answer regarding the research question applicable to participatory governance within the Commonwealth Caribbean society. Thus, this will be achieved in this research through a case law analysis of the data and or illustrative information on the application of the death penalty in the region.

In addition, the role of the Privy Council as the constitutional appeal court for the Commonwealth Caribbean along with the region constitutional process will be studied. Therefore, the analysis will embrace a case study of the nature of the death penalty in states within the Commonwealth Caribbean. Accordingly, *Garoupa* suggested that studies in constitutional law are more appropriate for the understanding of local conditions.[483] It is the need for an understanding of local situation in the region that forms the basis of this study and this aspect of the study will be channelled through a mixed method of exploration, explanation and evaluation.

It must be noted that it would be necessary to pursue this research, which is extant to the Commonwealth Caribbean region, primarily by utilising the secondary sources of

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[482] Robert Yin, *Case Study Research Design and Methods* (2nd edn. Thousand Oaks, London, Sage Publications 1994) 13.

[483] Nuno Garoupa, 'Empirical Legal Studies and Constitutional Courts' (2014) Indian Journal of Constitutional Law 26 – 54 at 29.

data collection. As such this case law analysis will be collated and presented in Chapter Four of this research. The objective is to present data in order to evaluate and explain the application of the death penalty within the Commonwealth Caribbean from a policy perspective. The actual effect of the attitude of the Privy Council is to demonstrate that its decision making impacts on the social environment of the region.

3.1.2: A Legal Analysis of the Judicial Decisions' on the Death Penalty in the Privy Council

Whereas the second part of this research will be a legal and textual documentary analysis of the judicial decision makings of the Privy Council reflective of its paradigm on the cruelty of the death penalty. This aspect predominantly relates to the qualitative interpretivist research and method of collecting evidence. This is achieved through a document review, assessment and evaluation on the data and illustrative information on the judicial decision makings by the Privy Council on the constitutionality of the death penalty in the Commonwealth Caribbean. Thus according to *Sag* and *Jacobi,* the patterns which emerged from such textual assessment are sufficiently clear to allow one to make some significant general conclusions on correlation.[484]

This legal analysis will be presented in Chapter Five of this project. It is based on the legal reasoning approach and it has as its major benefit a reflection which is more fully on the interactive nature of the context of legal decision making in the Privy Council.

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[484] Matthew Sag and Toni Jacobi, 'Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases' (2009) 98 Georgetown Law Journal 1 – 75, at 43.

According to *Levi* writing on legal reasoning, this aspect of research is an attempt to generally clearly describe the process of legal reasoning in the field of case law and in the interpretation of statutes and of the Constitution.[485]

In this regard there will be documentary review of the contents of constitutional appeal decisions at the Privy Council to understand the impact on the death penalty in the Commonwealth Caribbean. It will be based mainly on qualitative interpretations of judicial doctrine and would not be subjected to any quantitative examination. *Kastellec* described the advantage of such legal reasoning in terms of the hierarchical and interactive nature of legal decision making.[486]

Therefore, the objective of this aspect of the research is to explore the Privy Council rulings on the constitutionality of the death penalty. This is on the basis of its interpretation of the terms cruelty or inhumane in the Constitution within the states in the region. In the said review the categories of cruelty and its impact on the death penalty in the region along with the patterns of judicial behaviour are collated and analysed. The legal analysis in this area would be complemented with an analysis on human rights issues.

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[485] Edward Hirsch Levi, 'An Introduction to Legal Reasoning' (1948) 15 University of Chicago Law Review 501 – 574 at 501.

[486] Jonathan P. Kastellec, 'The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees' (2010) 7(2) Journal of Empirical Legal Studies 202–230 at 209 described legal reasoning in terms of ("the benefit of reflecting more fully the hierarchical and interactive nature of legal decision making but … is based mainly on qualitative interpretations of judicial doctrine and has not yet been subjected to quantitative examination.").

3.1.3: An Analysis of the Human Rights issues affecting the application of the Death Penalty in the Commonwealth Caribbean

The main issue here is whether the states in the region recognize individual human rights in the application of the death penalty. The constitutions within the individual Commonwealth Caribbean states guarantee certain rights for all people in the region without distinction of any kind. These rights include the rights to a fair and speedy trial, due process, trial by jury, and protection from cruel and unusual punishment.[487]

States are bound by international treaties such as the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty worldwide. In addition, some states have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and many other countries, however, have moved toward abolition.

It is proposed to present a discussion of those treaties in Chapter six of this research. This would be necessary to address the human rights issues which impacts on the death penalty in the region. Moreover, it would present an understanding and an explanation of the influence of judicial politics in the Privy Council on the death penalty in the region.

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[487] Constitution of the Republic of Trinidad and Tobago, s. 5(2).

3.2: Evaluation Design

The analysis pursued in this project will utilise a similar research model akin to that illustrated by *Lutz.*[488] This model has been adapted herein as the research plan of work for the legal and textual analysis to follow. It should be noted that this research model design is best suited for a classical based research analysis of this nature since it is applicable to the Commonwealth Caribbean as a society.[489] Thus, figure 3.1 below provides a graphic illustration of the research model design that has been followed in this descriptive and interpretive qualitative legal research analysis.

[488] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 27.

[489] Ibid.

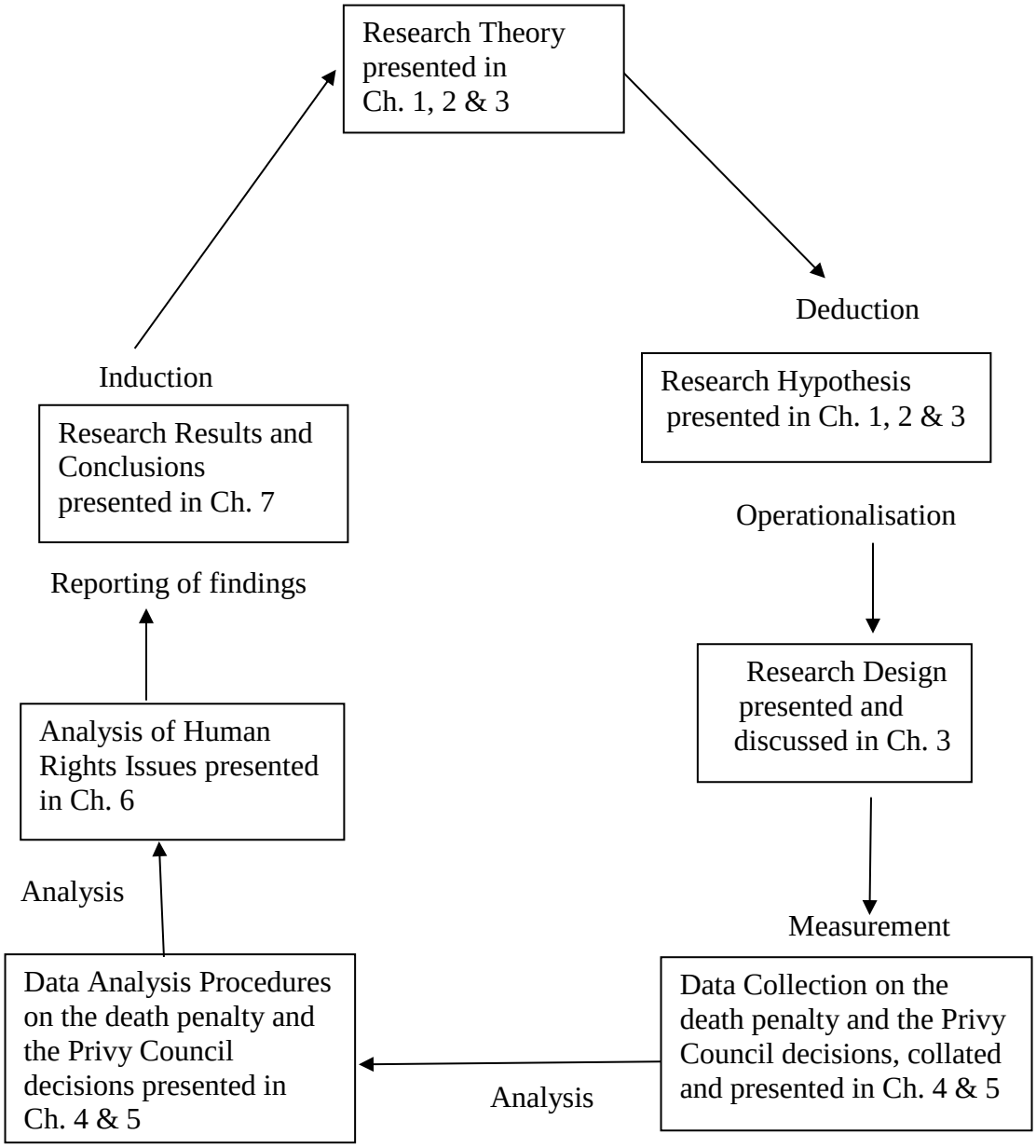

Figure 3.1: Evaluation Research Model[490]

[490] *Source:* Adapted from Lutz (1983) model in Gene M. Lutz, *Understanding Social Statistics* (Macmillan New York 1983).

This research model is the plan or blueprint for the research that has been conducted on the research question. Its span encompasses the presentation of a research theory, research hypothesis, research design, data collection on the death penalty and the Privy Council decisions, data analysis on the death penalty, the Privy Council decisions and human rights issues, research results and research conclusion. These features have been employed throughout the process of this research exploration and illustrate the varying areas of discussion within this project. The objective of this design model is to easily map the location of the information which present the idea that the constitutionality of the death penalty in this region is influenced by judicial politics.

3.2.1: Research Theory

Theory. Theories anchor one's research and a research is a test of theories. Therefore, theories seek to give plausible explanations to factual situations.[491] In this research the problems that are of concern are illustrated both in the legal doctrine in the *Pratt* case[492] and in the political statement made in 2007 by Mr. Patrick Manning, the then Prime Minister of Trinidad and Tobago.[493] In an effort to explore both ideas and seek plausible and credible explanations for the concepts within the legal doctrine and the theoretical perspective in the political statement, the theories that will be applied in this research investigation are akin to the classical school of criminology. As described

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[491] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (6th edn. Boston Press 2003) 9.

[492] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[493] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

in chapter two of this research they are the retributive theory, the rational choice theory and the social choice theory.

The use of these theories in this research is significant in that they are applicable to a phenomenon within the Commonwealth Caribbean society. According to *Cao* writing on major criminological theories, the classical school of criminology was nurtured by reformers responding to abuse of power and blatant inequities in the administration of justice.[494] It must be noted that the central themes in the classical school of criminology does not revolve around a criminology theory per se. It is more concerned with the criminal law and in particular the justice system addressing the way in which criminals are punished. Thus, it is important to note that in similar vein this research is applicable to a research in criminal justice and in particular the death penalty which is the punishment for the crime of murder in some Commonwealth Caribbean countries.[495]

For the purpose of this research the classical school of criminology is described as the administrative and legal aspects of criminology which in this project embrace the application of the death penalty. In this investigation, the classical school of criminology is adopted as a reflection for rethinking the prevailing concept on the constitutionality of the death penalty within the Commonwealth Caribbean society.

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[494] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont, California 2004) 29.

[495] Ibid.

The theoretical concept which is now presented is that there is the influence of judicial politics at the level of the Privy Council in constitutional appeals from the Commonwealth Caribbean on death penalty decisions.[496]

Hagan suggested in his work on criminal justice and criminology that theory attempts to classify and organise events, to explain the causes of events, to predict the direction of future events, and to understand why and how these events occur.[497] Unfortunately, in the Commonwealth Caribbean region, theories of crime, law and justice are virtually non-existent. However, despite the lack of any regional theories to guide this research, this investigation would not be compromised. In any event research is an international exercise and therefore this research would rely on other regions where most theories were developed and are relevant, giving plausible explanations to criminal justice phenomenon.[498]

Thus, a rational approach has been followed to select an appropriate theory which will guide the theoretical aspect of this research. In so doing, there are three theoretical perspectives that have been relied upon as reasonable explanations for the death

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[496] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont, California 2004) 30.

[497] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology,* (6th edn. Boston Press 2003) 9.

[498] Richard R. Bennett and James P. Lynch, 'Towards A Caribbean Criminology: Prospects and Problems' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 8 – 32.

penalty situation within the criminal justice system in the Commonwealth Caribbean region. They have been extrapolated from *Beccaria's* theory of society.[499]

The first theoretical perspective that is applicable is the retributive theory which seeks to explain the legal model and the death penalty characteristics. This theoretical perspective which is taken from the writings of *Beccaria* suggests that punishment should be based on retributive reasoning because the guilty person had attacked another individual's rights.[500]

The second theoretical perspective which is rational choice theory which seeks to explain the institutional model and the death penalty characteristics. The core assumption of this theory articulated by *Beccaria* is that the criminal is rational and that crime could be prevented through increased certainty, severity and celerity of punishment.[501]

The third theoretical perspective is social choice theory which is presented to explain the attitudinal model and the death penalty characteristics. This model engulfs the *Beccaria* theoretical perspective which suggests that it is better to prevent crimes than to punish them.[502]

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[499] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 29 – 30.

[500] Ibid.

[501] Ibid.

[502] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30 Beccaria indicated that ("The aim of a very good system of legislation was the prevention of crime. It is better to prevent crimes than to punish them…. Every punishment which is not soundly

In this research the adoption of these three theoretical perspectives is essential to this classical research on the death penalty within the Commonwealth Caribbean society. The reality is that they have been identified within the concepts extrapolated from the research problem in the *Pratt* statement of law[503] and also from the 2007 political statement made by Mr. Patrick Manning the then Prime Minister of Trinidad and Tobago.[504] In other words these three perspectives which were presented by *Beccaria* are in sync with the events which had unfolded from the said case. Therefore, these three theoretical perspectives are of sufficient quality to guide the formulation and the presentation of a classical theory applicable to this criminal justice research.

In this regard it must be noted that, *Bennett and Lynch* indicated that it may well be that with sufficient attention and thought, existing theories can be adapted to include more transparently the situations currently confronting Caribbean nations.[505] It is in this vein that a theory adaptation has been made from the classical research school which was exhibited in *Beccaria's* theoretical perspectives.[506] This adaptation was necessary to highlight the present investigative research and more importantly the

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based upon absolute necessity was tyrannical and that the more cruel and severe the punishment, the more the minds of men grew hardened and calloused.").

[503] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[504] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

[505] Richard R. Bennett and James P. Lynch, 'Towards A Caribbean Criminology: Prospects and Problems' (1996) 1 (1) Caribbean Journal of Criminology and Social Psychology 8 – 32 at 15.

[506] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

situation in the justice system in the Commonwealth Caribbean which is associated with the death penalty.

This theory construction gives a plausible explanation of the facts, law and justice that are related and relevant to the death penalty in the Commonwealth Caribbean region. Thus, the approach in this research will proffer a theory which postulates that:

- The constitutionality of the death penalty in the Commonwealth Caribbean has evolved through the influence of judicial politics. This is demonstrated through the process for the implementation of the death penalty. Its essential characteristic is that it must be consistent with the current features within contemporary jurisprudence, that is to say, it ought to exhibit a high degree of certainty and administered quickly. Any derogation from such norms will present issues of cruelty which would render the implementation of the death penalty unconstitutional.

This is a theory of society that is extant to the Commonwealth Caribbean region on the issue of the constitutionality of the death penalty and in this research it would be tested in chapter four, chapter five and chapter six. Basically this theory explains and predicts the research realities which is illustrated at the level of the specific hypothesis.[507]

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[507] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (6th edn. Boston Press 2003) 21 - 23.

3.2.2: Research Hypothesis

Hypothesis operationalisation. Hypothesis is a term used to describe a factual statement that can be tested to establish proof of whether it is correct or not. In *Bailey's* writing on social research he indicated that the 'New *World Dictionary of the American Language'* describes hypothesis as a tentative assumption made in order to draw out and test its logical or empirical consequences. This would imply insufficiency of presently attainable evidence and therefore a tentative explanation.[508]

Bailey further described the term hypothesis as a tentative explanation for which the evidence is necessary for testing.[509] It is in this vein that in view of the literature on the death penalty in the region, the background study pursued and also in view of the issues in the research question and emanating from the research theory, the specific hypothesis was formulated for testing.

Preliminary the research hypothesis which was deduced indicated that:

- The constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics in the Privy Council.

This specific hypothesis is the tentative answer given to the research question. It is a presentation of another aspect relative to the death penalty from a Commonwealth Caribbean perspective. It has also brought to the fore an international correlated model hypothesis perspective.

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[508] Kenneth D. Bailey, *Methods of Social Research* (2nd edn. Free Press New York 1982).

[509] Ibid.

Although international law does not prohibit the application of the death penalty as a punishment there is evidence of a rapid change towards a position in favour of a worldwide abolition.[510] This evidence can be isolated from the model hypothesis which is located in the United Nations *Resolution 32/61*.[511] That Resolution underpins the theoretical research model which explains in principle the description of judicial politics which is engraved in the legal doctrine in the *Pratt* case.[512] It was articulated in that Resolution that the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.[513]

It is obvious that this international model hypothesis perspective provides a clear demonstration of the nature and structure of the critical arguments in this research. It is a clear articulation of the common legal doctrine of international politics that is associated with the death penalty. This is a declaration of a piecemeal approach for the abolition of the death penalty worldwide. This aspect of international doctrinal politics that permeates the death penalty worldwide seems to have engendered the

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[510] International Bar Association, *The Death Penalty under International Law (*International Bar Association London United Kingdom 2008) 3 - 16.

[511] United Nations General Assembly, *Resolution 32/61* (Adopted 8th December 1977 9th plenary meeting, 32 Session United Nations General Assembly New York 1977).

[512] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[513] United Nations General Assembly, *Resolution 32/61* (Adopted 8th December 1977 9th plenary meeting 32 Session United Nations General Assembly New York 1977).

judicial politics which was adopted and pursued by the Privy Council in the *Pratt* case.[514]

In a reflection of this international model hypothesis it is obvious that the phrase: *"progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment"*[515] used in the *Resolution 32/61* presents a clear relation to the researcher's analytical model of judicial politics in the Privy Council. In fact this statement is a leading indicator of the international acceptance of judicial politics to curtail the use of the death penalty in the region. Moreover, this statement theoretically underpins the concepts within the research and is identifiable within the research hypothesis.[516]

In this research the qualitative methodology is used as the approach to conduct testing on the research theory in an effort to validate the research hypothesis that it is plausible or credible to suggest that the constitutionality of the death penalty in the region is influenced by judicial politics. This would involve the collecting, organising and analysing of the contents of texts and judicial pronouncements on the subject matter which is of a contemporary nature. In essence, this qualitative research methodology

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[514] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[515] United Nations General Assembly, *Resolution 32/61* (Adopted 8th December 1977 9th plenary meeting 32 Session United Nations General Assembly New York 1977).

[516] Ibid.

will consist of a detailed description of constitutional situations on the death penalty in the Commonwealth Caribbean region.

The process adopted in this methodology will navigate the exploration of judicial politics. It has provided information on the processes of judicial politics that is aimed at both restricting and reshaping the death penalty as a punishment in the region. This includes evaluating and explaining the paradox of the constitutionality of the death penalty. Thus, this research will demonstrate that in the absence of any changes in legislation or governmental policy in order to abolish the death penalty, the main explanation for the curtailment of the implementation of the death penalty in the Commonwealth Caribbean lies in the realm of the legal doctrine of judicial politics in the Privy Council.

3.2.3: Data Collection

The data for this research are obtained primarily from document review of judicial matters involving the challenges to the constitutionality of the death penalty in the Commonwealth Caribbean which were decided by the Privy Council and the secondary data statistics on the death penalty in the region. In the first instance the data collection of written documents occurred over the course of time for a number of years. In the latter instance the data was operationalised through a system of secondary sources of collection. It is worth noting that the content of data obtained in both instances are collated, analysed and evaluated to conduct the test to the key theoretical concepts in this research.

Content analysis. The content analysis method is the technique in this research used for gathering and analysing illustrative information from the contents of texts.[517] This method will provide a useful framework for studying texts which will be applied to and inform on the variables in order to explain the hypothesis. Several texts and their contents have been looked at and analysed in this study.

These literature includes the review of the texts in legal documents such as constitutional jurisprudence, statutory and constitutional instruments and academic references.[518] This also necessitates an understanding of the meaning conveyed by the texts and the impact it leaves on the Commonwealth Caribbean. Of importance is the approach of the Privy Council with regards to the constitutionality of the death penalty in the Commonwealth Caribbean States. Accordingly, *Hall and Wright* described content analysis of judicial opinions by indicating that it allows the legal academy to cross-pollinate our understanding of legal principles and institutions with the objective methods and epistemological assumptions of a social scientist.[519]

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[517] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 36 – 37.

[518] Ibid.

[519] Mark A. Hall and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' 96 (2008) California Law Review 63 – 122 at 121 – 122 said: ("Content analysis is much more than a better way to read cases, though. It has the power to transform classic interpretive skills into recognizable and transferable social science knowledge. In other words, this method creates a vessel for exporting the analytical insights of legal scholars in a form that the rest of the social science world will treat seriously. This is also more than just legal scholars adopting scientific methods to study social phenomenon relevant to the law, and more than social scientists studying legal phenomena. Content analysis allows the legal academy to cross-pollinate our understanding of legal principles and institutions with the objective methods and epistemological assumptions of a social scientist. Doing this, legal scholars can lay claim to a specialized ability to apply content analysis to the legally relevant aspects of judicial opinions. To this extent, content analysis forms the basis for a uniquely legal empirical methodology.").

Neuman expressed similar sentiment by suggesting that this technique is particularly suited in a research of this nature since it is an objective method which is free from bias and it provides an estimate of the reality.[520] The reality is that this method of analysis would communicate the effect of what is said and demonstrated by others in particular the Privy Council in the areas of the judicial politics and the constitutionality of the death penalty in the Commonwealth Caribbean States.

Secondary data analysis. The second method of data source in this research approach is the secondary data analysis. The major aspect of this method is presented in chapter four of this research. There are methodological reasons for the use of this method. It improves on the research by expanding the scope of the data. Thus, in this study it necessitates the use and analysis of data collected by other researchers and law enforcement authority on the death penalty in the region. The significance of this aspect of data collection is to assist in the operationalisation or informing on the nature of the death penalty.[521]

This method is facilitated here based on a conceptual-subjective reason which demonstrates that the use of secondary data analysis can achieve greater depth and scope in dealing with contemporary issues.[522] This data will definitely explain the

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[520] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 36 – 37.

[521] Chava Frankfort Nachmias and David Nachmias, *Research Methods in the Social Sciences* (5th edn. St. Martin's Press New York 1996) 304 – 322.

[522] Ibid.

ideological changes taking place in the application of the death penalty in the region. Here specific reference has been made of literature on its constitutionality and the area of human rights issues, which will be employed in this research.

Evaluation research. This third approach applied in this research is sometimes referred to as program evaluation. In general, it refers to a research purpose rather than to a specific research method and is a form of applied research. It is a key facet in social science research and is used specifically to evaluate real world effect such as the impact of social phenomena on society.[523]

Therefore, the use of the evaluation research in this exploration seems to be quite appropriate and relevant since the death penalty as the punishment for persons convicted of murder is a social phenomenon that impacts on the Commonwealth Caribbean society. It is for this reason that the social indicator which is applied in this research to monitor the death penalty is judicial politics. With the use of the social indicator, the data will demonstrate that it is plausible or credible, that the death penalty in the region is influenced by judicial politics.[524]

In a nutshell the research method of content analysis is relevant and applicable to all the chapters of this research. It was looked at from the onset and featured mostly in

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[523] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company Belmont California 1992) 9 - 10.

[524] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company 1992) 365 - 367.

the background study in Chapter one and the literature review in Chapter two. The secondary data analysis on the other hand is mostly presented in Chapter four. Whereas the evaluation research analysis is also relevant and applicable to all the chapters of this research, it was captured mostly in Chapters five and six. These research methods were used to draw illustrative information based on pronouncements made by the Privy Council and also to capture data which are necessary in order to gain knowledge about the concept of judicial politics which engulfs the death penalty.

3.2.4: Data Analysis and Reporting

Data Analysis Procedures. This research will employ both the case law analysis and the legal and textual analysis. The nature of case law analysis entails an assessment of the data on the death penalty in the Commonwealth Caribbean. This review is necessary in order to investigate the operative and functional aspects of law and its legal consequences on the death penalty.

Whereas the nature of legal and textual analysis which is used is documentary analysis to assess the performances of the Privy Council as a legal institution towards constitutional appeals on the death penalty. In light of the fact that each of the research methods has its own strengths and weaknesses, it was necessary to present the objective discussion with regards to each method. It is also noteworthy to emphasise that in this research these methods were looked at with a view of analysing the data relevant to the death penalty. That analysis was also necessary to test and validate the research theory and thereby confirm the hypothesis.

In addition, the qualitative evaluation research method is presented to articulate and explain the events of cruelty and its impact on the death penalty. In this presentation a comparison was made of the data collected with the relevant concept within the research theory statement and this is necessary to progressively justify the confirmation of the research hypothesis.

The purpose of this evaluation is to arrange the data gathered in a manner necessary to identify the varying patterns of legal, institutional and attitudinal behaviour and the inter-relationships between them. The arranged data is necessary to present the Privy Council concepts on the paradigm of cruelty which will definitely provide the criminal justice understanding of the death penalty in the region. That is to say, to validate the research theory and confirm the specific research hypothesis.

Principle. It is worth noting that the scientific principle which will be adopted in this research to understand the reality of the death penalty in the Commonwealth Caribbean would be the '*objective principle*.' Such principle would be related to or based on external verifiable phenomena as opposed to individual's perception, feelings or intention. It is approached from the standpoint of ethical neutrality and value-free perspective.[525]

The basis for the use of this principle here would be the necessity to objectively assess the judicial behaviour of the Privy Council towards the death penalty. That is to say

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[525] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004) 16 - 17.

by applying the objective principle terms embracing the words - plausible, credible, validates reliable and confirm – would be relevant in the analysis and in general throughout the research.

However, the initial assessment indicates that there was a positive reaction to the concepts of the research theory. Further, a confirmation of the research hypothesis was achieved from the analysis on the data collected in the investigation. The data would result in confirming that there is a correlation between judicial politics and the constitutionality of the death penalty in the Commonwealth Caribbean. Moreover, judicial politics in the Privy Council is a variable that is attributed to influence the constitutionality of the death penalty in the region.

Reporting of Findings. The reporting of the findings will be presented in Chapter Seven of this research. This is inclusive of the research results and the conclusions. *Hagan* advocated a stage-based approach for the reporting of findings.[526] This is necessary in order to classify the relationships that inform on the opinions of the reality. It entails ascribing values to the information gathered. However, *Patton* said that reporting on the findings also involved figuring out possible categories, patterns, and themes.[527]

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[526] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (6th edn. Boston Press 2003) 319 - 351.

[527] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3rd edn. Sage Publications Thousand Oaks publisher California 2002) 453 said: ("Qualitative analysis is typically inductive in the early stages, especially when developing a codebook for content analysis or figuring out possible categories, patterns, and themes.").

In this research it is proposed that both the data analysis and reporting of findings will be illustrated through the figuring out possible categories, patterns, and themes within the Privy Council decision making on the constitutionality of the death penalty in the Commonwealth Caribbean. This will be appropriate in order to validate the research theoretical concepts with the values of plausible or credible. The categories or patterns of behaviour that would be reported on in the research results are the legal, institutional and attitudinal behavioural models of decision makings. The presence of these categories or patterns of judicial behaviours would be both relevant and sufficient for the confirmation of the research hypothesis.[528]

3.3: Conclusion

In summary it is important to have an understanding of the work of *Edwards and Livermore* in order to pronounce on the purpose, goal and objective of the present research. In essence they said that legal studies can play a productive role in strengthening legal institutions by providing insights on the judicial process and suggesting areas for reform.[529]

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[528] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3rd edn. Sage Publications Thousand Oaks publisher California 2002) 453.

[529] Harry T. Edwards and Michael A. Livermore, 'Pitfalls of Empirical Studies That Attempt to Understand The Factors Affecting Appellate Decisionmaking' (2009) 58 Duke Law Journal 1895 – 1989 at 1966 – 1967 pronounced that ("Human institutions that are built on trust, respect, and a willingness to set aside personal interests for the good of society are fragile. It is important that institutions serving the public—and the individuals who comprise them—receive useful feedback. But critiques will not be taken seriously unless they are well targeted and supported in fact. … legal studies can play a productive role in strengthening legal institutions by providing insights on the judicial process and suggesting areas for reform.").

It is against this background that this research exploration is pursued. In order to give legitimacy to *Edwards and Livermore* suggestion[530] this research will utilise the interpretative qualitative methodology. This is necessary to examine and understand the research phenomena of judicial politics in the Privy Council and the constitutionality of the death penalty in the region.

By utilising this qualitative methodology, the researcher's proposed goal is in effect to engage in a study that explores published literature and also constitutional cases on the death penalty which emanated from the Commonwealth Caribbean region and were decided by the Privy Council. For practical purposes the exploration will commence with an evaluation of the *De Freitas* case[531] and culminate with a similar process in the case *Trimmingham v The Queen*.[532] This would be necessary to collect sufficient illustrative information on the approach of the Privy Council in death penalty cases.

During the exploration the key contemporary element that will be thoroughly examined would be a documentary review to assess the nature of the subject matter itself. This entails the present state of knowledge on judicial politics in the Privy Council on the death penalty in the Commonwealth Caribbean. Thus, the analysis of

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[530] Harry T. Edwards and Michael A. Livermore, 'Pitfalls of Empirical Studies That Attempt to Understand The Factors Affecting Appellate Decisionmaking' (2009) 58 Duke Law Journal 1895 – 1989 at 1966 - 1967.

[531] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[532] *Trimmingham v The Queen* [2009] UK PC 25.

the contemporary issues would be presented in Chapters four, five and six of this research.

The methodology in this research demonstrates that the paradigm herein is an exploratory inquiry into the social phenomenon, the death penalty in the Commonwealth Caribbean. The primary objective is to present a criminal justice understanding of the subject matter. The concerns in this chapter have been to set the stage for the research exploration. Thus, this chapter has outlined the research design on the death penalty paradigm in the region, stated the objectives or purposes for the exploration and defined the research methodology and research methods.

The rationale for the choices in the methodology used in this research allows for a comprehensive study on the Commonwealth Caribbean perspective on the issues which are necessary to test the research hypothesis. The choice of the methodology in this research also provides a body of knowledge that is independent of any personal experience and is rational, logical and permissible.[533]

However, there are negative implications which would be experienced during the research exercise. Although this research would most definitely contribute to the building process of a Caribbean legal and administrative criminology in terms of the

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[533] Chava Frankfort Nachmias and David Nachmias, *Research Methods in the Social Sciences* (5th edn. St. Martin's Press New York 1996) 13 - 16.

criminal justice system, it is extant only to the Commonwealth Caribbean region. This would suggest that it ought not to be generalised and used in other regions.

CHAPTER FOUR

THE DEATH PENALTY: A CASE LAW ANALYSIS FROM A POLICY PERSPECTIVE

In this chapter, the objective is to pursue an analysis of the death penalty in the region from a policy perspective. This would entail having an understanding of the administration of the death penalty as the punishment for the crime of murder. To understand this issue it will necessitate an analysis of the nature of the death penalty in the Commonwealth Caribbean region. This would be necessary to put in perspective an important consequence of the Privy Council rulings on the constitutionality of the death penalty and this would also increase our understanding of justice and punishment in the region.

4.1: The Nature of the Death Penalty in the Commonwealth Caribbean

The nature of the death penalty in the Commonwealth Caribbean can be explained in the context of a statement made by *Vollum, Mallicoat and Buffington-Vollum* to the effect that it remains a political and emotional hot button and polarizing point of debate in the realm of criminal justice and politics.[534] However, *Lofquist* on the other hand described the death penalty in simple term as a legal sanction imposed by the state upon conviction for a crime.[535]

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[534]Scott Vollum, Stacy Mallicoat and Jacqueline Buffington-Vollum, 'Death Penalty Attitudes in an Increasingly Critical Climate: Value- Expressive Support and Attitude Mutability' (2009) 5 (3) The Southwest Journal of Criminal Justice 221 – 242 at 222 said: ("Capital punishment remains a political and emotional hot button and polarizing point of debate as one of the de jour controversial issues in the realm of criminal justice and politics.").

[535] William S. Lofquist, 'Identifying the Condemned: Reconstructing and Analyzing the History of Executions in The Bahamas' (2010) (16) The International Journal of Bahamian Studies 19 – 34 at 20 indicated that ("At its most basic level, the death penalty operates as punishment, as a legal sanction

It is worth noting that the application of the death penalty in the Commonwealth Caribbean States remains the lawful punishment for persons convicted of murder. In the Republic of Trinidad and Tobago, it is stated in section 4 of the Offences Against the Person Act Chapter 11:08 that: *"Every person convicted of murder shall suffer death."*[536] This is the statutory provision prescribing the death penalty for persons convicted of murder but within the last two decades there have been serious issues with regards to its application.

The first area of concern necessitates a reflection on the death penalty policies applied in States' justice systems. Of significance here is the fact that the existing law on the death penalty, primarily for the offence of murder is antiquated. According to this statutory provision, once a person is found guilty of murder regardless of the nature and circumstance of the murder, his punishment is the mandatory death penalty. This provision sees no categorisation of this offence to address such areas as crimes of passion and diminished responsibility.[537]

The Abdulah Commission of Enquiry[538] into prison conditions, in the Republic of Trinidad and Tobago included a chapter on capital punishment. In that chapter, the

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imposed by the state upon conviction for a crime. At this level, its use is simply reactive, dictated by the criminal and the crime.").

[536] Offences Against the Person Act Chapter 11: 08 of Trinidad and Tobago, s. 4.

[537] Ibid.

[538] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) 112 – 118.

Commission looked at the situation with respect to the death penalty in the Republic of Trinidad and Tobago and compared it with the situation in other countries and by a majority, concluded that murder should be categorised. This was to facilitate the removal of some acts of killing reflecting acts such as crimes of passion, from the category that carries death as the punishment. However, what is worth noting is the opinion of the Commission's minority members. They believed that the death penalty should be abolished for a trial period of five years and that life imprisonment should be the punishment for murder during this period.[539]

In a subsequent parallel report, the Prescott Commission of Enquiry report into the death penalty in Trinidad and Tobago, a number of recommendations were made to address the antiquated death penalty law in Trinidad and Tobago .[540] A significant feature of the report was one of the Commission's recommendations in paragraph 59 and which required immediate action. It states that a prisoner, who was sentenced to death for more than ten years prior to the submission of the report, should have that death sentence commuted to life imprisonment. Interestingly, this approach is similar to the approach taken by the Privy Council in the *Pratt* case.[541]

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[539] Clive Abdulah, *Prison Conditions in Trinidad and Tobago: Commission of Enquiry into Prison conditions in Trinidad and Tobago* (Government Printer Port of Spain 1980) 114 – 115.

[540] Elton Prescott, *The Death Penalty in Trinidad and Tobago: Commission of Enquiry into the Death Penalty in Trinidad and Tobago* (Government Printer Port of Spain 1990) 21 – 28.

[541] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

The obvious reason in this regard is the antiquated policy dealing with the death penalty. One Commonwealth Caribbean country that made efforts to address the issue of antiquated laws dealing with the death penalty for persons guilty of murder is Jamaica. In October 1992, that country enacted the Offences Against the Person (Amendment) Act (1992), whose provision has the effect of categorising murder into capital and non-capital murder.

The effect of this categorisation means that capital murder carries the death penalty as punishment, whereas non-capital murder carries a term of imprisonment. It must be noted that the latter category addresses the issues of crimes of passion and diminished responsibility in Jamaica.[542] These are two issues which statutes in the Republic of Trinidad and Tobago have not yet been able to deal with.

Affiliated to the aspect of antiquated policy is the fact that it has been observed that in the wider Commonwealth Caribbean region, the policy of the administration of the death penalty demonstrates that it is a mandatory punishment for the crime of murder. In essence this means that once a person is found guilty of murder the punishment of death is obligatory.[543] This illustrates the second issue appertaining to the nature of the death penalty.

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[542] Offences Against The Persons (Amendment) Act of Jamaica 1992.

[543] Offences Against the Person Act, Republic of Trinidad and Tobago Chapter 11: 08, s. 4.

The use of the death penalty as a form of punishment has been denounced as being cruel. This is based on the obvious contradiction to the use of the death penalty as a punishment. That contradiction is evident from the fact that on the one hand the criminal justice system in the wider Commonwealth Caribbean imposes the mandatory death penalty for the crime of murder.[544]

On the other hand within the region there are constitutional provisions that seem to be at variance with the penal provisions of the criminal justice system which are prescribed for the death penalty. It should be noted that the constitutional provisions guarantee the right to life. This aspect clearly demonstrates an obvious anomaly and that conflict presents a serious problem in the application of the death penalty in the Commonwealth Caribbean.[545]

Against this background, it is manifestly clear that the mandatory imposition of the death penalty in the wider Commonwealth Caribbean is labelled as being unconstitutional even in terms of the provision of the penal justice system.[546] This unconstitutionality has extended to the application of the death penalty. Not only has the death penalty been looked at as being unconstitutional, but it is viewed as a violation of the individual human rights of the condemned person.[547]

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[544] Constitution of the Republic of Trinidad and Tobago, s. 4.

[545] Ibid.

[546] Offences Against the Person Act, Republic of Trinidad and Tobago Chapter 11: 08, s. 4.

[547] Constitution of the Republic of Trinidad and Tobago, ss. 4 and 5.

In the Commonwealth Caribbean, opponents to the death penalty have often argued that it should be abolished and have advanced several reasons in this regard. Key reasons advanced are that the death penalty is final and irreversible. In the event of error, a human being's life would have been taken unnecessarily. Moreover, it is also argued that it is unconstitutional since it is a cruel and an unusual form of punishment.[548]

Accordingly, *Falco and Freiburger* claimed that the most punitive type of punishment is arguably the death penalty.[549] The reality is that the death penalty is as old as society itself. The application of the death penalty clearly stems from society's desire to dispense with a form of relative justice which appears to be equal to the crime committed or a crime worthy of such a punishment.[550]

It should be noted that in the Commonwealth Caribbean the death penalty is imposed for the crimes of murder, after a final judgment of guilt, and the accused will have legal assistance available to him at all stages of the proceedings. Those persons under the sentence of death will have a right of appeal to a higher court - the Privy Council being the highest appeal court for some Commonwealth Caribbean States - before the death sentence is carried out.[551]

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[548] Constitution of the Republic of Trinidad and Tobago, ss. 4 and 5.

[549] Diana L. Falco and Tina L. Freiburger, 'Public Opinion and the Death Penalty: A Qualitative Approach' (2011) 16 (3) The Qualitative Report Niagara University, New York 830 – 847 at 830.

[550] Offences Against the Person (Amendment) Act of Jamaica 1992 and Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11: 08, s. 4.

[551] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

In essence, all these factors account for the delay in the carrying out of the death penalty and currently this issue of delay has made it more and more difficult for the death penalty to be carried out in the region. This is so, in spite of the fact that the laws of Commonwealth Caribbean States prescribe the death penalty as the punishment for murder.[552]

The most important issue on the death penalty, which has attracted attention in the Commonwealth Caribbean region, is whether prolonged delay renders a decision to carry out the death penalty unconstitutionally. Advocates for the death penalty are of the opinion that delay in the carrying out of the death penalty is not unconstitutional. They believe that the death penalty is authorised by the laws of the region and it should be carried out.[553]

Despite the serious issues alluded to, concerning the administration of the death penalty in the region, there seems to be overwhelming popular support for this punishment in the region. This issue was considered in a survey conducted by the ANSA McAL Psychological Research Centre of The University of the West Indies, St. Augustine Campus, Trinidad (1994-1999). In its report it indicated that: *"on the issue of the death penalty for murder in Trinidad and Tobago, an overwhelming*

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[552] Offences Against the Person (Amendment) Act of Jamaica 1992 and Offences Against the Person Act, Republic of Trinidad and Tobago Chapter 11: 08, s. 4.

[553] Constitution (Amendment) Act of Barbados 2003.

proportion of the sample expressed their support for its retention in the wake of calls for its abolishment."[554]

The data supplied in this survey exhibited some startling revelations. It showed that in 1994 there were ninety-six percent in popular support for the death penalty for the crime of murder. This survey also produced data indicating support for the use of the death penalty as a punishment for other crimes such as rape and drug trafficking. It indicated that in 1994 there was sixty percent popular support for the death penalty for the offences of rape and drug trafficking.[555]

The analysis presented in this section together with the data extrapolated from a survey conducted by the ANSA McAL Psychological Research Centre of The University of the West Indies showed a consistency in the public support for the death penalty as the punishment for murder in the region.[556] Moreover, *Falco and Freiburger* added that: *"Strong public support for capital punishment is the number one reason why the death penalty continues to be used as a form of correctional policy in the U.S. criminal justice system."*[557]

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[554] Ramesh Deosaran, 'Crime, Justice and Politics in Trinidad and Tobago: Trends and Analysis 1994-1999' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 85 – 111 at 87.

[555] Ibid.

[556] Ramesh Deosaran, 'Crime, Justice and Politics in Trinidad and Tobago: Trends and Analysis 1994-1999' (1999) 4 (½) Caribbean Journal of Criminology and Social Psychology 85 – 111 at 87 - 90.

[557] Diana L. Falco and Tina L., 'Freiburger, Public Opinion and the Death Penalty: A Qualitative Approach' (2011) 16 (3) The Qualitative Report Niagara University, New York 830 – 847 at 830.

Such is a corresponding factor in the Commonwealth Caribbean as alluded by *Hood* that there is strong public support for the death penalty.[558] It is for this reason, an in-depth approach has been followed in this exploration to gather data on the death penalty in the Commonwealth Caribbean in order to gain a deeper understanding of the nature of its constitutionality.

In the Commonwealth Caribbean, with the exception of Anguilla, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands, the criminal justice system imposes the death penalty as the punishment for the crime of murder.[559] Those specially named territories on May 10, 1991 abolished the death penalty for persons convicted of murder. This was made possible through the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991. Thus, by virtue of this statutory instrument it would now be illegal and unconstitutional for those British dependencies territories to impose the death penalty on persons convicted of murder. Thus, where a person is convicted of murder in those countries, such a person shall only be sentenced to imprisonment for life.[560]

In other Commonwealth Caribbean countries such as Antigua and Barbuda, Belize, Dominica, Grenada, St Kitts and Nevis and Saint Vincent and the Grenadines[561]

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[558] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 60.

[559] Offences Against the Person (Amendment) Act of Jamaica 1992 and Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11: 08, s.4.

[560] Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991.

[561] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC *and Reyes v The Queen* [2002] 2 AC 235, PC.

Jamaica[562] and The Bahamas[563] there is the discretionary death sentence. In such a case, the death penalty can only be applied constitutionally for the worst cases of murder.[564]

In the wider Commonwealth Caribbean region there is the mandatory death penalty for the crime of murder. This is applicable to the Republic of Trinidad and Tobago[565] and Barbados.[566] It is also important to note that as alluded to earlier, in Jamaica the death penalty is categorised and should be mandatory in cases of murder 1, or capital murder.[567] However, that punishment is now deemed to be discretionary since the Privy Council decision in *Watson v Attorney General of Jamaica*.[568] In that case the Privy Council held that the mandatory death penalty for murder as applied under Jamaican law was unconstitutional and invalid.[569]

In Guyana, there is a limitation to the mandatory death penalty. It is available only for persons convicted of murdering specific individuals such as law enforcement

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[562] *Watson v Attorney General of Jamaica* [2004] 64 WIR 241, PC.

[563] *Bowe and another* v The *Queen* [2006] 1WLR 1623, PC.

[564] Organization of American States General Secretariat, 'American Convention on Human Rights' (Organization of American States San Jose Costa Rica 1969).

[565] Offences Against the Person Act of the Republic of Trinidad and Tobago, Chapter 11: 08, s. 4.

[566] Constitution (Amendment) Act of Barbados 2003.

[567] Offences Against the Person (Amendment) Act of Jamaica 1992.

[568] *Watson v Attorney General of Jamaica* [2004] 64 WIR 241, PC.

[569] *Ibid.*

officials, prison officers, and members of the judiciary. All other individuals who are convicted of murder in Guyana received the penalty of imprisonment.[570]

It should be noted that the death penalty in the Commonwealth Caribbean countries is carried out by hanging. Even in the case where the death penalty is mandatory there are statutory exceptions to the use of this punishment. For instance, the death penalty cannot be imposed on a guilty person who at the time of the commission of the crime of murder was under the age of eighteen years or insane or in the case of a woman who was pregnant. This was well articulated by *Bailey* who said that: *"A judge had to pronounce this sentence upon a person convicted of murder, except in two special classes of cases: persons under eighteen years of age at the time of the offense and pregnant women. He had no discretion to impose any less severe sentence."*[571] In those instances, such a guilty person must be detained at the State's pleasure.[572]

In a cursory glance at the procedure in the Commonwealth Caribbean where the death penalty is the applicable punishment for a person who is indicted for murder, such a person will be tried at the High Court before a judge and a twelve-member jury. The

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[570] Criminal Law Offences (Amendment) Act of the Cooperative Republic of Guyana No. 14 of 2010.

[571] Victor Bailey, *The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51'* (2000) 18 (2) Law and History Review 305 – 349 at 305.

[572] Dana S. Seetahal, *Commonwealth Caribbean Criminal Practice And Procedure* (Cavendish Publishing Limited United Kingdom 2001) 447 and Criminal Procedure Act of the Republic of Trinidad and Tobago Chapter 12:02.

jury must arrive at a unanimous verdict for the death penalty to be imposed. In such a case the person is found guilty the judge is compelled to impose the death penalty.[573]

The condemned person has a right to lodge an appeal with the local Court of Appeal. That person has within twenty-one days following the conviction to do so. Should the appeal be dismissed, then that condemned person can apply for leave to appeal to the Privy Council. Usually an appeal to this institution is based on the issue involving a point of law of general public importance.[574]

Where an appeal against conviction and sentence for murder is dismissed the condemned person may, pursuant to the Constitution, file a constitutional motion in the High Court. This is in fact a civil procedure, which is heard in the first instance by the High Court and there is a right of appeal to the Court of Appeal and then to the Privy Council. Such an action examines whether there is any violation of the rights and freedoms, which are enshrined in the Constitution within the Commonwealth Caribbean States. One area in which the condemned person often seeks a ruling from the court, is as to whether prison conditions amount to cruel and unusual treatment.[575]

Worthy of mention here, is that the final possibility of mercy for a condemned person is for that person to receive a pardon. In the Republic of Trinidad and Tobago this is

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[573] Offences Against the Person Act of the Republic of Trinidad and Tobago, Chapter 11: 08, s. 4.

[574] Constitution of the Republic of Trinidad and Tobago, ss. 108 and 109.

[575] Constitution of the Republic of Trinidad and Tobago, ss. 4 and 5.

provided for by the Constitution. The President who is the Head of State may pardon a person on the advice of a Minister designated by the Prime Minister.[576]

The undermentioned table 4.1 illustrates the situation which deals with the application of the death penalty in the Republic of Trinidad and Tobago. It articulates the number of persons on death row as at December 31, for the years 1997 to 2016.

Table 4.1: Number of persons on death row and the application of the Death Penalty in the Republic of Trinidad and Tobago from 1997 to 2016[577]

December 31, Year	Number of Persons on Death Row for year ending	Number of Persons Executed for the Year
1997	104	Nil
1998	104	Nil
1999	108	10
2000	66	Nil
2001	76	Nil
2002	84	Nil
2003	90	Nil
2004	86	Nil
2005	83	Nil
2006	84	Nil
2007	76	Nil
2008	31	Nil
2009	39	Nil
2010	31	Nil
2011	-	Nil
2012	-	Nil
2013	-	Nil
2014	-	Nil
2015	32	Nil
2016	32	Nil

[576] Constitution of the Republic of Trinidad and Tobago, s. 87.

[577] Republic of Trinidad and Tobago, *Trinidad and Tobago Prison Service Records* (Ministry of Justice Trinidad 2016).

The lack of executions is also practical evidence of the delay in the application of the death penalty in the Republic of Trinidad and Tobago. In fact, the last execution in the Republic of Trinidad and Tobago occurred on July 28, 1999 when Anthony Briggs was executed. Prior to that date in June 1999, nine other persons were executed in this country. This lack of execution is not unique to the Republic of Trinidad and Tobago. It is a phenomenon in the penal justice system within other Commonwealth Caribbean States.[578]

It is for a similar reason that in this research a review of the prevailing punishment of the death penalty is studied at the level of the Privy Council primarily in terms of judicial behaviour. The reality of carrying out the death penalty in the Commonwealth Caribbean is presented below in table 4.2. This table provides data concerning the most recent application of the death penalty in the regional states.

[578] Anthony Gifford, 'The Death Penalty: Developments in Caribbean Jurisprudence' **(**2009) 37 (2) International Journal of Legal Information 196 – 203.

Table 4.2: Summary of last executions in Commonwealth Caribbean States and names of persons executed[579]

Commonwealth Caribbean States	Date of last execution	Persons executed	Method of execution
Antigua and Barbuda	February 21, 1991	Tyrone Nicholas	Hanging
Bahamas	January 6, 2000	David Mitchell	Hanging
Barbados	October 10, 1984	Noel Jordan, Melvin Iniss and Errol Farrell	Hanging
Belize	June 1985	Kent Bowers	Hanging
Dominica	August 8, 1986	Frederick Newton	Hanging
Grenada	October 17, 1978	Charles Ferguson	Hanging
Guyana	August 1997	Michael Archer and Peter Adams	Hanging
Jamaica	February 18, 1988	Nathan Foster and Standford Dinnal	Hanging
St. Kitts and Nevis	December 19, 2008	Charles Elroy Laplace	Hanging
St. Lucia	October 17, 1995	Joseph Solomon Vitalis	Hanging
St. Vincent and the Grenadines	February 13, 1995	Hamlet Franklin Thomas and David Collins	Hanging
Trinidad and Tobago	July 28, 1999	Anthony Briggs	Hanging

When an evaluation is carried out on the data in table 4.2 there seems to be no traction in terms of the application of the death penalty in the Commonwealth Caribbean. In fact for the last twenty years only one person was executed in the Commonwealth Caribbean region. This last execution in the region was on December 19, 2008 in St. Kitts and Nevis when Charles Elroy Laplace was hanged and prior to this execution the Bahamas executed David Mitchell on January 6, 2000. The net effect of this is presented in table 4.1 where in the region there are many persons on death row. This

[579] Anthony Harriott, *The Jamaica Crime Problem: Some Policy Consideration,* (Crime and Criminal Justice in the Caribbean Kingston Arawak Publications 2004) and Anthony Gifford 'The Death Penalty: Developments in Caribbean Jurisprudence' **(**2009) 37 (2) International Journal of Legal Information 199.

delay or lack of execution has been equated by the Privy Council to be excessive cruelty on the part of the State in the Commonwealth Caribbean.

The failure of the Executive to adequately respond in terms of implementation of the punishment was alluded to by Mr. Ramesh Lawrence Maharaj the then Attorney General of the Republic of Trinidad and Tobago who said: *"However, at the onset, it seemed that justice is thwarted. The main reasons for this were the excessive delays imposed on the court system that contravened the stipulated time frames set down by the Privy Council before condemned murderers could be hanged."*[580]

As presented in table 4.1 above within the last two decades this region has seen a challenge with the death penalty rarely been implemented as the punishment for murder. This challenge has been remarkably significant both in Jamaica and the Republic of Trinidad and Tobago. Table 4.3 below illustrates some comparative data on the death penalty for both countries.

Table 4.3: Comparative data on the persons on death row in Jamaica and Trinidad and Tobago from 1997 to 1999.[581]

Year	No. of Persons on Death Row in Jamaica	No. of Persons on Death Row in Trinidad and Tobago
1997	49	104
1998	47	104
1999	44	108

[580] Republic of Trinidad and Tobago, *Implementation of the Death Penalty in Trinidad and Tobago 1995-2000* (Ministry of the Attorney General and Legal Affairs Trinidad 2000) ii.

[581] Anthony Harriott, 'The Jamaica Crime Problem: Some Policy Consideration' (Crime and Criminal Justice in the Caribbean Kingston Arawak Publications 2004).

In Jamaica the number of persons on death row in 1997, 1998 and 1999 were forty-nine, forty-seven and forty-four for the respective years. During that said period there were no executions in Jamaica.[582] However, in 1997 and 1998 in Trinidad and Tobago there were one hundred and four persons on death row for each of those years. While in 1999 there were one hundred and eight persons on death row in that country. In addition, in 1997 and 1998 there were no executions in the Republic of Trinidad and Tobago however, according to the data presented in table 4.1, in 1999 ten persons were executed in that country.[583]

It must be noted that Jamaica and the Republic of Trinidad and Tobago are not the only Commonwealth Caribbean countries that exhibit such a striking phenomenon, as there are similarities in other regional States. The important point here is that, even though these regional States have the death penalty as law, that law is not implemented. For instance, in Saint Kitts and Nevis there were nineteen persons on death row in 1998 and only one person was executed in that year. In that said year, The Bahamas had forty death row inmates and only two persons were executed. Saint Lucia had forty persons on death row in 1998 and that country did not carry out any executions in that year.[584]

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[582] Anthony Harriott, 'The Jamaica Crime Problem: Some Policy Consideration' (Crime and Criminal Justice in the Caribbean Kingston Arawak Publications 2004).

[583] Ramesh Deosaran, *Crime Statistic, Analysis and Policy*: *The Way Forward* (Government printer Port of Spain (2001); and Roger Hood and Florence Seemungal, A *Rare and Arbitrary Fate, Conviction for Murder, the Death Penalty and the Reality of Homicide in Trinidad and Tobago* (European Commission and Foreign and Commonwealth Office 2006).

[584] Saint Lucia Royal Police Force, *Annual Report on the Organisation and Administration of Royal Saint Lucia Police Force: For the year 1998* (Saint Lucia Government Printer 1998).

This data clearly indicates that with the limited execution in the Commonwealth Caribbean region, most death row inmates remain languishing in prison. *Radelet and Borg* have argued that the public debate towards the death penalty has changed. It was suggested by them that support for the death penalty today relies on the grounds of retribution.[585]

Moreover, it is worth noting that the changing nature of the death penalty was part of a worldwide trend towards its abolition. That being the case then it is worthwhile having an understanding of this trend from the perspective of the Privy Council. This would be primarily from its role in terms of the concept of judicial politics. In this regard *Radelet and Borg* also subscribed to the notion that discourse on the death penalty is changing since there is an accelerating worldwide decline in the acceptance of capital punishment.[586]

The reality is that such optimism is fuelled not by the conservative politician but by the liberal justices and their attitudinal behaviour. Such a situation was explored in

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[585] Michael L. Radelet and Marian J. Borg, 'The Changing Nature of Death Penalty Debates' (2000) (26) University of North Carolina 43 – 61 at 44.

[586] Michael L. Radelet and Marian J. Borg, 'The Changing Nature of Death Penalty Debates' (2000) (26) University of North Carolina 43 – 61 at 57 indicated that the ("discourse on the death penalty is changing, there is an accelerating worldwide decline in the acceptance of capital punishment. Indeed, the trend toward the worldwide abolition of the death penalty is inexorable. ……. Nonetheless, taking a long-term historical view, the trend toward the abolition of the death penalty, which has now lasted for more than two centuries, will continue. Things could change quickly; the final thrust might come from conservative politicians who turn against the death penalty in the name of fiscal austerity, religious principles (e.g., a consistent "pro-life" stand), responsible crime-fighting, or genuine concern for a "smaller" government. Public support for the death penalty might also drop if there emerged absolute incontrovertible proof that an innocent prisoner had been executed. For those who oppose the death penalty, the long-term forecast should fuel optimism.").

this research and it was demonstrated that the liberal justices of the Privy Council in their decisions have demonstrated a clear dissatisfaction against the use of the death penalty.[587]

4.2: Conclusion

The qualitative information on the nature of the death penalty in the Commonwealth Caribbean which was unearthed and analysed in this chapter demonstrated a lack of execution in the region. This has primarily presented the constitutional issue of the delay in execution. In this regard *Steiker* indicates that several jurisdictions have abandoned the death penalty following years of state legislative inactivity resulting in the declined of executions. This resulted in the size of the nation's death row swelling and many of them face no realistic prospect of execution.[588]

The objective assessment that can be made from the data presented is that it is credible to conclude that there is an insurmountable delay in the application of the death penalty in the Commonwealth Caribbean. The data presented in the next chapter will illustrate the reality of such delay and the Privy Council's dissatisfaction of this delay in terms of cruelty of the death penalty.

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[587] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[588] Jordan M. Steiker, 'The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism' (2013) 67 University Miami Law Review 329 – 355 at 329 indicated that ("After a long period of stability, the American death penalty looks newly fragile. Several jurisdictions have recently abandoned the death penalty following years of state legislative inactivity. Death sentencing has declined, as have executions. Although the size of the nation's death row has swelled, many of the condemned face no realistic prospect of execution. Popular support for the death penalty appears more tenuous. Many of our "peer" countries have abandoned the death penalty. Perhaps most importantly, after years of indifference, the U.S. Supreme Court has revealed a new willingness to examine state death penalty practices.").

CHAPTER FIVE

JUDICIAL POLITICS IN THE PRIVY COUNCIL AND THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN: A LEGAL ANALYSIS

5.1: Explaining the Patterns of Judicial Politics in the Privy Council on the Constitutionality of the Death Penalty in the Commonwealth Caribbean

Descriptive statistics: Although there is a considerable body of knowledge and jurisprudence relating to judicial politics and the death penalty in Europe, Asia and the United States of America, this is not the case in the Commonwealth Caribbean region. There is a paucity of comparable research on the death penalty in the Commonwealth Caribbean, examining judicial politics and constitutional issues. It is with this in mind that this research explored the present state of knowledge on judicial politics in the Privy Council in order to present its impact on the death penalty in the Commonwealth Caribbean states.

Moreover, this has afforded the Commonwealth Caribbean region the opportunity to add to that already growing body of knowledge on judicial politics. It therefore means that this research will find a significant place in the scholarly researches on judicial politics and the death penalty for this region. In particular it provides data on the subject area to define the gap between the pronouncement of the death penalty and the implementation of this punishment.

Thus, this is achieved through a contextual study of the approach of th*e* jurisdiction of the Privy Council. This approach will be necessary since this institution is the final judicial arbiter for some States in the region. In addition, its jurisprudential approach

on the death penalty in the region is very attractive. Thus, in this regard the issue that has been considered and resolved entails whether in light of both the majority and minority decisions of the Privy Council in the *Riley* case and the subsequent ruling in the *Pratt* case, which adopted and embraced the minority or dissenting decision in the *Riley* case, the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics.

Data on the constitutionality of the death penalty in terms of judicial behaviour in the Privy Council will be presented and evaluated to respond to the issue raised in the research question. This would be portrayed in terms of the rule of law and judicial politics. The representations served to put in context the qualitative information unearthed in this research exploration. The attempt here is to evaluate the illustrative information in order to present the patterns of the judicial attitude towards the constitutionality of the death penalty. In addition, the presentation of this judicial attitude is also necessary to demonstrate the correlation which is embedded between the variables – judicial politics and the constitutionality of the death penalty.

In this regard, *Edwards and Livermore* said that legal studies can supplement traditional legal scholarship to help inform litigants, policymakers and society as a whole about how the legal system works.[589] Naturally, this idea is the essence of this research analysis which will see the presentation of an understanding of the legal

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[589] Harry T. Edwards and Michael A. Livermore, 'Pitfalls of Empirical Studies That Attempt To Understand the Factors Affecting Appellate Decisionmaking' (2009) 58 (8) Duke Law Journal 1895 – 1989 at 1966.

doctrine of judicial politics in the Privy Council through the issue of the constitutionality of the death penalty.

In *Scherer* writing on, testing the court decision making under the microscope, he indicated that even though law and precedents are still relevant to Supreme Court decision-making, what is most critical in this regard, is that the attitudinal model remains the holy grail of decision-making models.[590] This theoretical perspective embraces the three behavioural models which are depicted in this research. Thus, the statement is suggesting that law or the legal model, precedents or the institutional model together with the policy preference or attitudinal model present an understanding and an explanation of the decision-making procedure of the Privy Council on issues revolving around the death penalty in the Commonwealth Caribbean. It is for this reason that this chapter of the research sets out to confirm this proposition.

It is in this regard that there is a presentation of the data and illustrative information unearthed in the present research. *Smith* commented that judges are political actors who choose to make law rather than merely interpret it and their decision will inevitably be informed by the judges' own ideology or preference.[591] This clearly

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[590] Nancy Scherer, 'Testing the Court: Decision Making Under the Microscope,' (2015) (50) Tulsa Law Review 659 – 668 at 661.

[591] Mark Smith, *Disrobed: The New Battle Plan to Break the Left's Stranglehold on the Courts* (Three Rivers Press New York USA 2006) 48 emphasised that there is ("No doubt about it, judges are political actors. They regularly deal with complex, politically charged cases, and sometimes they are required (choose) to make law rather than merely "interpret" it. In any given case, judges must somehow make sense of all the conflicting claims in order to reach a decision; that decision will inevitably be informed by the judges' own ideology, priorities, and, yes, biases.").

articulates a court's decision of judicial politics and therefore, the discussion in this section will address the extent of the judicial politics by the Privy Council.

The data on this extent of judicial politics at the level of the Privy Council is defined in terms of the cruelty of the death penalty and a tabular description is presented in table 5.1 below. The importance of this table is that it contains data collected, collated and assembled on the Privy Council Commonwealth Caribbean constitutional appeal matters on the death penalty from 1975 to 2009 and such data would be discussed throughout this chapter.

However, in order that this table satisfactorily accommodates the data for analysis, the said table was designed with six columns. Each column was giving a separate heading and was reflective of the nature of the data extrapolated from the twenty-two (22) judicial decisions of the Privy Council in this study.

Column one reflects the numbering from 1 – 6 and is based on the amount of cruelty illustrated. There were six types of cruelty identified and they were illustrated in column two under the rubric category of cruelty. The first category of cruelty assembled dealt with was delay of execution. The second category of cruelty addresses swiftness of execution. The third category of cruelty is reflective of the mandatory or discretionary death sentence. The fourth category presents the cruelty of prison conditions, while the fifth category presented dealt with the cruelty of ministerial advice prior to execution. Finally, the sixth category surrounds the cruelty of opinions of international human rights bodies.

There are the twenty-two (22) judicial decisions of the Privy Council which were studied in order to extrapolate the nature of the judicial behaviour. Those decisions were in each instance, collated and presented in column three of the said table under the rubric judicial process. These matters emanated from the Eastern Caribbean States, Belize, Jamaica, St. Vincent, The Bahamas and Trinidad and Tobago. They include but are not limited to the *Pratt's* case, *Hughes* case, the *Fox* case, the Watson case, the *Roodal* case, the *Matthew* case and the *Trimmingham* case. It should be noted that some of the matters illustrated under judicial process are identified with more than one type of category of cruelty. For instance, the *Pratt* decision is reflected in category one, three and six whereas the *Lewis* decision can be located in category four, five and six.

The pattern of judicial ideology is presented in column four. This column presents the justification for the pattern of judicial behaviour in the Privy Council decision making extrapolated from each case. Such pattern embraces one of three types. The first is the original intent or binding precedent and this is in effect the predictor of judicial behaviour. The second is a demonstration of the propensity to be conservative by following precedent and the third pattern type is the demonstration of the propensity to be liberal by deviating from the precedent. Moreover, each category of cruelty assembled has been analysed and the picture of judicial politics in terms of the legal model, the institutional model and the attitudinal model which are portrayed in the decision are presented under the rubric of model of decision and are illustrated in column five. Finally, column six illustrates the overall impact of the individual category of cruelty on the Commonwealth Caribbean society.

Table 5.1: Descriptive data of the categories of cruelty on the constitutionality of the death penalty and the patterns of judicial behaviour from 1975 to 2009

No.	**Category of cruelty**	**Judicial process**	**Pattern of Judicial Ideology in the Decision making**	**Model of Judicial decision**	**Overall Impact of this Category of cruelty**
1.	Delay of execution	De Freitas case (1975)	Binding precedent - Predictor of judicial Behaviour.	Legal	**1. Domestic impact** Following the *Pratt's* case Jamaica commuted 105 death sentences. Trinidad and Tobago commuted 52 death sentences. **2**. **Public Policy impact** Delay in excess of five years is considered inhuman or degrading treatment. **3**. The court Judicially directing the death penalty policy.
		Abbott case (1979)	Propensity to be conservative by following Precedent	Institutional	
		Riley case (1982)	Propensity to be conservative by following Precedent	Institutional	
		Bell case (1985)	Propensity to be liberal by deviating from Precedent	Attitudinal	
		Pratt case (1993)	Propensity to be liberal by deviating from Precedent	Attitudinal	
		Guerra case (1995)	Propensity to be liberal by deviating from Precedent	Attitudinal	
		Reckley (1995)	Propensity to be conservative by following Precedent	Institutional	
		Farrington case (1996)	Propensity to be liberal by deviating from Precedent	Attitudinal	
2.	Swiftness of Execution	Guerra case (1995)	Propensity to be liberal by deviating from Precedent	Attitudinal	**1.** The Privy Council established the reasonable notice of execution rule that is four days' notice prior to execution. **2.** Overall impact, swiftness of execution constitutes cruel and unusual punishment.
		Farrington Case (1996)	Propensity to be liberal by deviating from Precedent	Attitudinal	
		Boodram case (No. 2) (1999)	Propensity to be liberal by deviating from Precedent	Attitudinal	

3.	Mandatory/ discretionary death sentence	Hughes case (2002) Fox case, (2002) Reyes case, (2002) Watson case (2004) Roodal case (2004) Mathew case, (2005) Bowe case (2006) Trimmingham case (2009)	Propensity to be liberal Propensity to be liberal Propensity to be liberal Deviated from precedent Deviated from precedent Deviated from precedent Deviated from precedent Deviated from precedent	Attitudinal Attitudinal Attitudinal Attitudinal Attitudinal Attitudinal Attitudinal Attitudinal	**1.** The death penalty should only be available where there is no possibility of reform and social reintegration of the offender. **2.** The imposition of the death penalty requires special justification. **3.**The death penalty should be reserved for the worst of the worst cases. **4.** Overall impact, the Privy Council acknowledged the inhumanity of the mandatory death penalty.
4.	Prison conditions	Pratt case (1993) Thomas case (1998) Lewis case (2001)	Propensity to be liberal Binding precedent Deviated from precedent	Attitudinal Legal Attitudinal	Overall impact, the Privy Council in the *Lewis* case held that prison conditions amount to inhuman and degrading treatment.
5.	Ministerial advice prior to execution	De Freitas case (1975) Reckley case [No. 2] (1996) Lewis case (2001)	Binding precedent Precedent followed Deviated from precedent	Legal Institutional Attitudinal	Overall impact, the merits of the petition are not for the court to review but where there is the failure of the observance of the rules of natural justice or fair play in action same would be cruel.
6.	Opinions of international human rights bodies	Pratt case (1993) Fisher case (2000) Higgs case (2000) Lewis case (2001)	Binding precedent Deviated from precedent Deviated from precedent Deviated from precedent	Legal Attitudinal Attitudinal Attitudinal	Overall impact, there is recognition for international bodies where the Privy Council in the *Pratt's* case urged that the decision of international tribunals be afforded weight and respect.

5.2: A Legal Case Analysis of the Privy Council Paradigm of Cruelty on the Death Penalty

Paradigm of cruelty. The basis of judicial politics in this exploration surrounds the interpretation of the term cruelty in the Constitution. This has been a significant judicial attribute in the constitutionality of the death penalty in the region. It was noticeable from the illustrative evidence presented in the literature review in Chapter Two. It is also obvious from the secondary data and case law analysis of the illustrative information presented from the study of the death penalty in Chapter Four.

Accordingly, from a perusal of the data in table 5.1, it was noticed that there are six categories of cruelty illustrated in column two of the said table. Further, through the concept of judicial politics the Privy Council developed the issue of cruelty through its failure to observe precedents and by its attitudinal approach thereby deciding matters according to judicial preferences or ideologies. The reality is that such approaches created the six categories of cruelty which are in reality exemptions for the application of the death penalty. When viewed from the context of the approach of the Privy Council these exemptions are in effect the judicial condemnations of the death penalty. From this research context these condemnations validate and also confirm the researcher's analytic model of judicial politics in the decisions on the constitutionality of the death penalty in the region (see table 5.1 above).

However, in contrast it should be noted that *Berger* in his writing on the death penalty indicated that capital punishment was not understood to be cruel and unusual in a constitutional sense per se. This conclusion is based on the fact that the death penalty

was not considered to be cruel and unusual at the time of the Constitution, it follows, for *Berger,* that the death penalty is not so now.[592]

It is worth noting that the terms *cruel, unusual treatment, torture, inhuman or degrading punishment* are common terms within the constitution in the Commonwealth Caribbean. Accordingly, section 5(2) (b) of the Constitution of the Republic of Trinidad and Tobago states that Parliament may not impose or authorise the imposition of cruel and unusual treatment or punishment.[593]

It should be noted that the term *cruelty* has been a notable feature in the written Constitution of the Republic of Trinidad and Tobago as illustrated in the section above. Of significance here is that it seems that this country's Constitution is modelled after the Canadian Bill of Rights 1960. The similarity of both is prominent, based on a reflection of section 2 (b) of the said Canadian Bill of Rights which proclaimed: *"no law of Canada shall be construed or applied so as to impose or authorize the imposition of cruel and unusual treatment or punishment*."[594]

The term *inhuman* is present in the Constitution of Jamaica and that of the Eastern Caribbean countries. Accordingly section 17 of the Constitution of Jamaica provides

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[592] Raoul Berger, '*Death Penalties*, (Harvard University Press, Cambridge, Massachusetts, 1982) 43-49.

[593] Constitution of the Republic of Trinidad and Tobago, s. 5(2) (b) ("Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not- (b) impose or authorise the imposition of cruel and unusual treatment or punishment.").

[594] Canadian Bill of Rights 1960 Chapter 44.

that: *"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment"*[595] whereas section 7 of the Constitution of St. Kitts and Nevis provides that: *"A person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment."*[596] It seems that those Constitutions are modelled after the European Convention on Human Rights 1950. Article 3 of the said Convention illustrates the similarity by proclaiming: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*[597]

Bessler in a research on unusual punishment indicated that the prohibition against cruel and unusual punishment can he broken down into three concepts namely: cruelty, unusualness, and punishment.[598] However, in a contrasting view by Garner, in the following terms *'unusual treatment, torture, inhuman or degrading punishment; inhuman,'* seems to be synonymous with the term *"cruel."*[599] Waldron on the other hand suggested that these terms indicate a range of attitudes towards others.[600] The reality is that such descriptions of punishment mean that they do not comport with

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[595] Section 17 of the Constitution of Jamaica.

[596] Section 7 of the Constitution of St. Kitts and Nevis.

[597] Article 3 European Convention on Human Rights 1950.

[598] John D. Bessler, 'The Concept of Unusual Punishment in Anglo-American: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual' (2018) 13 (4/2) Northwestern Journal of Law and Social Policy 307 – 416 at 411.

[599] Bryan A. Garner, *Black's Law Dictionary* (8th edn. Thomson-West Publishing Co. Saint Paul, Minnesota USA 2004) 799.

[600] Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* (New York University Public Law and Legal Theory Working paper 98, 2008) 1 - 47.

human dignity and decency.[601] In this regard *Donnelly* indicated that human dignity is an essential and unique feature which distinguishes human beings from other creatures. Moreover, the right of human dignity, as well as, decency are inherent in all human beings.[602]

It is for this reason that this research embraces all the terms by focusing on an assessment of the term cruelty. Interestingly *Stinneford* indicated that the word *cruel* in the cruel and unusual punishments clause means unjustly harsh.[603] Thus the significance of the word *cruel* in this section of the Constitution would suggest at first glance that any punishment that is *cruel* would be deemed unconstitutional.

In reality it seems that the Privy Council's interpretation of the word "*cruelty*" in constitutional matters have a similar indication and therefore it is being used to restrict the implementation of the death penalty in the region. This is on the basis that the death penalty is recognised as a violation of human rights both domestically as illustrated within the Commonwealth Caribbean Constitution[604] and internationally as illustrated in the International Bill of Human Rights.[605] It should be noted that

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[601] Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* (New York University Public Law and Legal Theory Working paper 98, 2008) 1 - 47.

[602] Jack Donnelly, *Protecting Dignity: Agenda for Human Rights* (Geneva Academy of International Humanitarian Law and Human Rights 2009) 1 – 92 at 1 – 84.

[603] John F. Stinneford, 'The Original Meaning of Cruel' (2017) 105 (44) The Georgetown Law Journal 441 – 506 at 441.

[604] Constitution of the Republic of Trinidad and Tobago, s. 5(2) (b) and Section 17 of the Constitution of Jamaica and Section 7 of the Constitution of St. Kitts and Nevis.

[605] Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law' (2000) 11(4) European Journal of International Law 833 - 856.

internationally, Article 2 of the *'United Nation Convention Against Torture'* prohibits torture and other cruel, inhuman, or degrading treatment or punishment.[606]

However, *Berkman* in her writing on the subject indicated that the term cruel and unusual punishments does not have any "natural and proper" meaning but it is a label for amoral concept which we call "cruelty.[607] In this regard there have been several judicial pronouncements on the issue of cruelty as it relates to the constitutionality of the death penalty. Thus, the discussion on this issue seeks to demonstrate the notion that the Privy Council expressed the concept of cruelty in varying forms. Moreover, the doctrinal-politics approach is the form applied by the Privy Council to illustrate the concept of cruelty (see table 5.1 above).

It seems that in defining cruelty the Privy Council applies values which are indeed external factors that are fundamental to the society. *Manheim* suggested that courts apply the normative approach in defining cruel and inhumane punishment.[608] In this

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[606] United Nation Convention Against Torture and Other Cruel, Inhuman, or degrading treatment or punishment (United Nation December 10, 1984, 145 UN.T.S. 85 [entered into force June 26, 1987].

[607] Miriam Berkman, 'Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment,' (1982) Yale Law & Policy Review 41 – 79 at 41 indicated that ("The phrase "cruel and unusual punishments" does not, on its face, describe any discrete set of readily ascertainable penalties. It does not have any "natural and proper" meaning. Rather, it is a label for amoral concept we call "cruelty." Giving concrete meaning to the cruel and unusual punishments clause is a process of clarifying the values as-associated with the constitutional concept of cruelty and applying them to particular cases.").

[608] Karl M. Manheim, 'The Capital Punishment Case: A Criticism of Judicial Method' (1978) 12 Loyola of Los Angeles Law Review 85 – 134 at 90.

regard he said that the meaning of the term 'cruel and unusual' was tied to the maturing ethical values of society.[609]

It was also discovered in this research that the Privy Council has applied the normative approach in defining *cruelty* in the constitutionality of the death penalty in terms of six variables, (see table 5.1). In so doing the Privy Council has categorised and valued cruelty in terms of delay of execution, swiftness of execution, mandatory/discretionary death sentence, prison conditions, ministerial advice prior to execution and opinions of international human rights bodies on the petition of reprieve. These are factors which are external to the Constitution and the death penalty law but are fundamental and ethical to a maturing society since they affect human dignity and decency.[610]

As *Manheim* indicates that for establishing standards for cruel and unusual punishment the Justices used external factors and objective evidence of the evolving standards of decency upon which to base constitutional principles.[611] In the United States of America the paradigm of cruelty portrays a different connotation. According

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[609] Karl M. Manheim, 'The Capital Punishment Case: A Criticism of Judicial Method' (1978) 12 Loyola of Los Angeles Law Review 85 – 134 at 90.

[610] Ibid.

[611] Karl M. Manheim, 'The Capital Punishment Case: A Criticism of Judicial Method' (1978) 12 Loyola of Los Angeles Law Review 85 – 134 at 92 indicates ("chose to seek external and objective evidence of the evolving standards of decency upon which to base constitutional principles. …. By using such external factors, these Justices rejected a reliance on personal moral feelings in establishing norms for humane punishment.").

to *Bedau's* description of *cruelty,* it is the wilful infliction of physical pain on a weaker being in order to cause anguish and fear.[612]

In another description of cruelty which was presented by *Tennen* who said that in order for it to be recognised as cruel and unusual, the Court has held that a punishment must either be barbaric or disproportional.[613] Even though the Court have at times indicated that the application of the death penalty to some individual in the United States of America is unconstitutional, it has generally not found this punishment to be cruel and unusual since it is not barbaric or disproportional.[614]

In similar vein *Berger* was critical of notion that the death penalty was cruel and unusual and a violation of the Constitution.[615] In a book review presented by *Edmundson,* he illustrated the two reasons why the death penalty is not unconstitutional. He said that in the first instance the death penalty cannot be cruel and unusual in a constitutional sense and in the second instance any review by the Supreme Court of the states' sentencing procedures is an unconstitutional usurpation of legislative power. [616]

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[612] Hugo Adam Bedau *Why the Death Penalty Is a Cruel and Unusual Punishment, The Death Penalty in America* (Oxford University Press 1997) 232 – 237 at 232.

[613] Eric Tennen, 'The Supreme Court's Influence on the Death Penalty in America: A Hollow Hope?' (2005) Public Interest Law Journal 251 – 275 at 269.

[614] Ibid.

[615] Raoul Berger, Death *Penalty* (Harvard University Press Cambridge Mass 1982) 242.

[616] William A. Edmundson, 'Death Penalty' (1984) 621 Duke Law Journal 624 – 639 at 625 said: ("First, capital punishment cannot be cruel and unusual in a constitutional sense, and second, proportionality review of state sentences and sentencing procedures by the Supreme Court is an unconstitutional usurpation of legislative power by the federal judiciary.").

It is important in this regard to note that *Berger* has made the claim that given that the death penalty was not considered cruel and usual at the time of the United States Constitution in 1791[617] it cannot now be so considered.[618] However, by evaluating the paradigm of the Privy Council on each of the forms of judicial expression of cruelty of the death penalty it seems clear that even though the death penalty was not cruel and unusual at the time of the Constitution in the Commonwealth Caribbean, it is now deemed to be so.

In this regard Justice Brennan in the case *Furman v Georgia* said that a punishment is cruel and unusual if it does not comport with human dignity.[619] As a corollary to this, *Mendes* indicates that the death penalty survived the enactment of written constitutions on independence, either because the constitutions themselves do not prohibit the taking of life as long as it is done in accordance with the due process of law, or because the death penalty is expressly saved from constitutional challenge.[620]

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[617] Raoul Berger, Death *Penalty* (Harvard University Press Cambridge Mass 1982) 242.

[618] William A. Edmundson, 'Death Penalty' (1984) 621 Duke Law Journal 624 – 639 at 625 - 626.

[619] *Furman v Georgia*, 408 U.S. 238 (1972), at pp. 271-3 Justice Brennan said: ("A punishment is cruel and unusual …. if it does not comport with human dignity. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. . The true significance of these punishments ….. is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.").

[620] Douglas L. Mendes, *The Slow Demise of the Death Penalty in the Commonwealth Caribbean* Center for International Relations 2015) 49 at 50.

The point to note is that for the Privy Council the concept of cruelty of the death penalty explains the evolving standard of decency which preceded the Commonwealth Caribbean states' Constitutions. In particular it engulfed the application of the death penalty and encompasses the nature of judicial politics[621] whereas in the United States of America the death penalty was descried in similar terms in the case *People v. Anderson*. In that case it was held that the cruelty of the death penalty also revolved around the dehumanizing effects of the lengthy imprisonment prior to execution.[622] In a recent study *Radelet* indicated that in the past two decades the United States has moved away from several methods of execution over the past two decades because these methods offend evolving standards of decency.[623]

In 2001 the Eastern Caribbean Court of Appeal in the *Hughes* case and the *Fox* case, along with *Reyes* case in Belize ruled that the automatic imposition of the death penalty without any judicial discretion amounts to cruel and inhuman punishment. Such ruling was appealed before the Privy Council and there it was unanimously held that the imposition of the mandatory death sentence, regardless of the circumstances

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[621] Douglas L. Mendes, *The Slow Demise of the Death Penalty in the Commonwealth Caribbean* (Center for International Relations 2015) 49.

[622] *People v. Anderson,* 493 P.2d 880, 894 (Cal. 1972) it was held that ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.").

[623] Michael L. Radelet, 'The Incremental Retributive Impact of a Death Sentence Over Life Without Parole' (2016) University of Michigan Journal of Law Reform *7*95 – 815 at 805 indicated that ("while the death penalty has been increasingly justified on retributive grounds, in the past two decades the United States has moved away from several methods of execution (e.g., electrocution, hanging, shooting) over the past two decades because these methods offend evolving standards of decency.").

was arbitrary and unconstitutional. That decision was delivered in March 2002 and the Committee sent the matters of the prisoners concerned back to the local courts in their own countries for re-sentencing. In effect the decisions in those cases have outlawed the mandatory death penalty in the Eastern Caribbean countries and the country of Belize on the basis of cruelty.[624]

In delivering the judgement in those cases, the Privy Council held that in a crime of this kind, there may well be matters relating both to the offence and the offender which ought to be considered before sentence is passed.[625] The implication of this judgement is that the mandatory death penalty for the Eastern Caribbean countries and the country of Belize has been struck down as being unconstitutional. This means that the death penalty in Antigua and Barbuda, Belize, Dominica, Grenada, Saint Kitts and Nevis and Saint Vincent and the Grenadines cannot be imposed, unless a judge looks at the circumstance of the case to determine whether it should be imposed.[626]

It also means that all other inmates on death row in those countries prior to this judgement, will now have their sentences reviewed. Further, the death penalty is now

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[624] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[625] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC it was held that ("In a crime of this kind, there may well be matters relating both to the offence and the offender which ought to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny him his basic humanity.").

[626] *Ibid.*

no longer mandatory in the Eastern Caribbean countries and the country of Belize but it is now discretionary. Thus, it is unconstitutional for the death penalty to be imposed in any manner that is not in keeping with the *Hughes, Fox and Reyes* judgments.[627]

Subsequent to the decision in those cases, the Privy Council in a majority judgement purported to abolish the mandatory nature of the death sentence for convicted murderers in the Republic of Trinidad and Tobago. In so doing, it declared in the *Roodal* case that such impositions make the death penalty cruel and unconstitutional.[628]

The brief facts in that case are that on July 15, 1999 Roodal was sentenced to death for the murder of Philbert Charles. Roodal shot and killed Charles on August 19, 1995, after Charles and other men tried to rob him of his marijuana. He had challenged the decision of the local Court of Appeal, which confirmed the mandatory death sentence on him. This matter was decided by five Law Lords in the Privy Council. It was held by a majority of three to two that the mandatory death sentence was cruel and unconstitutional as it was in contravention to Article 4.2 of the Inter-American Convention on Human Rights.

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[627] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[628] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

The decision in this case would suggest an adoption of the international and comparative law into the Trinidad and Tobago domestic legal system. In this regard *Antoine* in writing on the Commonwealth Caribbean Law and Legal Systems indicated that the courts in this region are more and more adopting, unilaterally, of treaty obligations and values, without benefit of the legislative process.[629]

Moreover, in similar vein *Schabas* in writing on the International Legal aspects said that the use of the death penalty sits squarely within those issues which are fundamentally matters of domestic criminal policy and in which international human rights law has been increasingly assertive.[630] Of particular significance here is the fact that in *Roodal* case,[631] the Privy Council has judicially contrived the international instrument - Article 4.2 of the Inter-American Convention on Human Rights which provides that the death sentence may only be imposed for the most serious crimes - into the domestic law.

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[629] Rose-Marie B. Antoine, 'Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems' (2005) 29 (2) Nova Law Review 140 – 169 at 154 said: ("Increasingly, Commonwealth Caribbean courts, whether local courts or the Privy Council sitting as a Caribbean court, are being influenced by normative standards laid down by notions of international consensus of what are human rights and democratic ideals. Commonwealth Caribbean legal systems conform to the common law approach to international law that international law does not supersede domestic law unless incorporated. However, the courts are more and more adopting, unilaterally, of treaty obligations and values, without benefit of the legislative process.").

[630] William A. Schabas, *International Legal Aspects* (Capital Punishment Global Issues and Prospects, Waterside Press 1996) 17.

[631] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

The basis for this decision in *Roodal* case[632] revolved around the fact that Trinidad and Tobago on May 28, 1991 ratified the 1969 American Convention on Human Rights. On May 26, 1998 it went ahead and denounced the said convention which took effect on May 25, 1999. However, given the fact that the murder for which *Roodal* was charged with occurred on August 19, 1995 then it was accepted that the Convention was enforced at that time for the purpose of this decision. It was for this reason that the Privy Council applied section 68 of the Interpretation Act in interpreting the said Article in ruling that the death penalty in Trinidad and Tobago is discretionary and denounced the mandatory death penalty as being cruel and therefore unconstitutional.[633]

The importance of this decision is that it exposes the conflict with the application of the death penalty in the Commonwealth Caribbean and deemed it as being unconstitutional. This is based solely on the fact that there is no categorisation of the crime of murder in the Republic of Trinidad and Tobago. In essence the ruling indicates that regard ought to be had for the offender's personal or extenuating circumstance for committing the offence.[634]

In effect the Privy Council's judgement in *Roodal's* case has made a bold attempt to bring the death penalty law of the wider Caribbean in line with the Eastern Caribbean

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[632] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[633] *Ibid.*

[634] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

countries and also that of the country of Belize as the judgement in the *Hughes* case, the *Fox* case, and the *Reyes* case, depicts.[635] It also brought the system of justice in this region in tandem with the international standards of punishment.[636] Thus the Commonwealth Caribbean countries which would have been affected by the *Roodal* decision include the Republic of Trinidad and Tobago, Barbados and Jamaica. The obvious impact of that decision would have been the restricting of the death penalty in the region.[637]

However, the implication of this judgement suggests that the general imposition of the death penalty in the wider Commonwealth Caribbean region is unconstitutional, as it is cruel and is contrary to the individual's basic human rights. Interestingly, doubts were expressed as to the correctness of the decision in this case. In fact it was touted that the decision in the *Roodal* case was based on the judicial preference of justices of the Privy Council in deciding the case according to the efficiency of the death penalty and not on the application of the rule of law.[638]

This apparent judicial abolition of the death penalty in the Republic of Trinidad and Tobago clearly works against the theoretical perspective of this research and that of *Beccaria's* theory of society which illustrates that the complete criminal law code

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[635] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[636] Article 6 of the International Covenant on Civil and Political Rights (ICCPR) in 1976.

[637] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[638] *Ibid.*

should be written and all offences and punishment should be defined in advance.[639] In other words the punishments were to be decided by the legislature and not by the court.[640] It seems that in the *Roodal* case the punishment was decided by the court and for this reason that decision has clearly validated the researcher's analytic model of judicial politics.[641] Moreover, for such reason the decision in *Roodal* case was challenged subsequently in another constitutional appeal in the Privy Council.[642]

This subsequent challenge was promoted in the *Matthew* constitutional appeal. [643] This appeal saw an unusual number of nine Law Lords sitting at one time to decide the appeal. The main issue to be decided was the constitutionality of the mandatory death penalty in the Republic of Trinidad and Tobago. At the appeal, Barbados joined as an interested party and was allowed to make submission before the Privy Council.[644] This was because of the similarity in the nature of both countries Constitutions in terms of the general saving clause.[645]

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[639] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004), 30.

[640] Ibid.

[641] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[642] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[643] *Ibid.*

[644]*Ibid.*

[645] Margaret A. Burham, 'Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean' (2004) 36 (2 & 3) Inter-American Law Review 249 -269 at 250.

The Privy Council through its attitudinal approach deviated from the institutional model of following precedent and overruled its previous decision in the *Roodal* case.[646] The consequence of that ruling is that the death penalty for persons convicted of murder in the Republic of Trinidad and Tobago will henceforth continue to be mandatory. The implication of this decision demonstrates that the Privy Council is not infallible and was prepared to correct its own mistakes. It also revalidated and confirmed that the death penalty is influenced by the judicial politics of the Privy Council.[647]

The rationale for this confusion revolved around two conflicting provisions which affect the implementation of the death penalty in the region. One of the two provisions deals with the penal code which authorised the death penalty as the punishment for murder.[648] The other is the constitutional provision which declares, amongst other things, that Parliament shall not impose or authorise the imposition of cruel and unusual punishment.[649]

It is important to note that *Stinneford* suggested that a punishment is considered cruel and unusual if its effects are unjustly harsh in light of longstanding prior practice.[650]

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[646] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[647] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[648] Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11:08, s. 4.

[649] Constitution of the Republic of Trinidad and Tobago, s. 5 (2) (b).

[650] John F. Stinneford, 'The Original Meaning of Cruel' (2017) 105 (44) The Georgetown Law Journal 441 – 506 at 441.

That being the case it is necessary to examine the penal provision which authorised the death penalty for persons convicted of murder[651] to understand whether it is in direct conflict with section 5 (2) (b) of the Constitution. A reflection of both provisions would suggest that there are inconsistencies in their application particularly in terms of the penal provision which authorises the death penalty for murder.

A further difficulty can be viewed in light of the statement made in section 4 of the said Constitution. That section states that there is*: "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."*[652]

It is important to note here that the Constitution in the Republic of Trinidad and Tobago is supreme. It is the law from which all laws derive, thus it supersedes all other law. Accordingly, the pronunciation of section 2 of the Constitution of the Republic of Trinidad and Tobago specifically states that: *"This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with the Constitution is void to the extent of the inconsistency."*[653]

Interestingly, although the Constitution is critical of Parliament imposing *'cruel and unusual punishment,'* it also makes provision for exceptions in instances of an existing

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[651] Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11: 08, s. 4.

[652] Constitution of the Republic of Trinidad and Tobago, s. 4.

[653] Constitution of the Republic of Trinidad and Tobago, s. 2.

law. Section 6 (1) of the said Constitution states that: "*Nothing in sections 4 and 5 shall invalidate- an existing law."* Interestingly, section 6 (3) of the said Constitution indicates that an*: "existing law means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution and includes any enactment referred to in subsection (1).*"[654]

This provision clearly defines a general savings clause in the Trinidad and Tobago Constitution and that provision prevents constitutional challenge to any law in existence at the time of independence in 1962. This type of general saving clause is found in two other Commonwealth Caribbean countries, namely Barbados and Jamaica. It should be noted that the other Commonwealth Caribbean countries with the exception of Belize possess partial savings clause which is limited solely to judicial punishment. Whereas in Belize the savings clause has an expiry date of five years after independence.[655]

It should be noted further that the Republican Constitution of Trinidad and Tobago was enacted in 1976 in the form of Act number 4 of 1976. Since then, the Constitution has gone through several amendments. These include the amended Act number 15 of 1978, Act number 16 of 1978 and Act number 30 of 1979. It is in light of the provision of section 6 (1) of the Constitution that the death penalty law is to be assessed in order

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[654] Constitution of the Republic of Trinidad and Tobago, s. 6 (3).

[655] Andrew Novak, 'The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis' (2012a) 22 (2) Indiana International and Comparative Law Review 267 – 295 at 273.

to determine whether it is in the category of an existing law. That is to say, whether the death penalty law for persons convicted of murder in the Republic of Trinidad and Tobago was an existing law in that it was enacted before the Act number 4 of 1976.[656]

An examination of the Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter 11: 08 shows that the original version of this Act was enacted in 1925 in the form of Ordinance number 10 of 1925. That Ordinance made provision for the death penalty for persons convicted of murder. It means therefore, that the law on the death penalty for murder was in existence at the time when Britain was then in direct control over Trinidad and Tobago.

Thus, by necessary implication, the death penalty law in the Republic of Trinidad and Tobago - section 4 of the Offences Against the Person Act Chapter 11: 08 - is protected and saved by section 6 (1) of the Constitution as an existing law. This means that in Trinidad and Tobago the death penalty as the punishment for the crime of murder remains valid until Parliament has the legislative will to repeal it.[657] This was the pronouncement in the *Matthew* case[658] and therefore, in simple terms the judiciary and in particular the Privy Council does not possess the authority to strike down the death penalty as unconstitutional.[659]

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[656] Offences Against the Person Act of the Republic of Trinidad and Tobago Chapter11:08, s. 4.

[657] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[658] *Ibid.*

[659] *Ibid.*

The validation of the death penalty as the punishment for murder in Trinidad and Tobago presents a similar situation for Barbados and Jamaica.[660] Commenting on the issue of the saving clause, *Burham* said that the general clause of the Constitution of Trinidad and Tobago saves all existing law from judicial challenge, including, of course, laws that are incompatible with fundamental rights guarantees.[661]

Since section 2 of the Constitution proclaims that the Constitution is the supreme law and as such there could be no legal basis for the challenge of the death penalty as being unconstitutional in the Republic of Trinidad and Tobago.[662] Moreover, this would narrow the research analysis down to the realm of the implementation of the death penalty. That is to say, the act of carrying out the death penalty on a person convicted of murder has been a prerogative of the Executive.

This tentative statement is provided for under section 57 (2) of the Criminal Procedure Act of the Republic of Trinidad and Tobago.[663] That statutory provision authorised the President to issue a warrant directing the execution being carried out.[664] Such an

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[660] Andrew Novak, 'The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis' (2012a) 22 (2) Indiana International and Comparative Law Review 267 – 295 at 273.

[661] Margaret A. Burham, 'Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean' (2004) 36 (2 & 3) Inter-American Law Review 249 -269 at 250.

[662] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[663] Criminal Procedure Act of the Republic of Trinidad and Tobago Chapter 12 : 02, s. 57 (2).

[664] Criminal Procedure Act of the Republic of Trinidad and Tobago Chapter 12 : 02, s. 57 (2) states that ("The President may, by warrant under his hand and Seal directed to the Marshall, respite any such execution and, by the same or any subsequent warrant so signed and sealed, order such execution to be carried into effect at such time and place as shall be appointed and specified in the warrant, in which case the execution shall be done at such time and place as shall be so appointed.").

Executive act of carrying out of the death penalty was also judicially articulated by the Privy Council in the *De Freitas* case.[665] In that case Lord Diplock said that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws.[666] Unfortunately, although the court recognises and supports the notion that the death penalty is authorised by law, there is no evidence since 1999 that the Republic of Trinidad and Tobago has made any real effort to implement it. In fact, the statement made at a public consultation on crime in Trinidad and Tobago is quite interesting in this regard. Here the then Prime Minister of the Republic of Trinidad and Tobago admitted to his Executive's failure to implement the death penalty.[667]

An objective evaluation of this position revealed the problems associated with the implementation of the death penalty. The inability to carry out the death penalty stems largely from the position adopted by the Privy Council.[668] This pronouncement is a preliminary validation of the influence of judicial politics in the application of the death penalty, a feature which had been theorised in this research.

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[665] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[666] *De Freitas v Benny* [1975] 27 WIR 318, PC. Lord Diplock said that ("It is their Lordships' view clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution.").

[667] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79 Mr. Patrick Manning, the then Prime Minister of the Republic of Trinidad and Tobago said: ("Capital punishment; that has been the subject of a lot of discussions in Trinidad and Tobago, and our inability to carry it out stems largely from the position adopted by the Privy Council. It has been particularly accentuated with the advent of Britain to the European Union and the attitude of the European Union to this whole question of capital punishment. The law lords in London, the Judicial Committee of the Privy Council which, as you know, is the highest court for Trinidad and Tobago, are taking the position that they put one impediment after the next in the way of the execution of capital punishment in this country.").

[668] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

In January 2011 the Kamla Persad-Bissessar administration in Trinidad and Tobago introduced a Bill in Parliament which attempted to amend section 6 of the Constitution to exclude the judicial opinions of the Privy Council. The intention of this Bill was to ensure that the death penalty could be implemented. That Bill, the Constitution (Amendment) (Capital Offences) Bill No. 2 of 2011, failed to get the necessary approval in Parliament because it did not get the required three-fourths majority in the House of Representatives.

However, the legislative intent of the government was clear and this was described accordingly by Kamla Persad-Bissessar, the then Prime Minister of Trinidad and Tobago who indicated that the said law was crucial to overcoming the hindrances to the implementation of the death penalty arising from the Judicial Committee's jurisprudence. [669] The objective assessment which has been deduced in this regard is that the death penalty in the region is based on antiquated laws. In this regard *Bessler* said that such antiquated laws should be replaced by new norm, based on the international standard.[670]

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[669] Freya Maclean-Boyd, 'Capital Punishment in the Caribbean: A need For Change' (2017) 5 North East Law Review 51 – 69 at 55 said the law was ("crucial to overcoming the hindrances to the implementation of the death penalty arising from the Judicial Committee's jurisprudence and … a measure to … respond to the high number of murders that each year are committed in Trinidad and Tobago.").

[670] John D. Bessler, 'The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions' (2018) 79 (7) Montana Law Review 8 – 48 at 47 said: ("although the use of death sentences and executions was once seen as a lawful sanction, that antiquated societal norm should be replaced by a new norm: an international law standard prohibiting the death penalty under all circumstances as part of the existing jus cogens norm barring torture.).

It therefore means that this antiquity in the administration of the death penalty has anchored the Commonwealth Caribbean region in the past, and this has led to a variety of procedural irregularities in its effort to observe fundamental societal values such as human rights. In addressing the antiquity of the death penalty *Manheim* suggested that there is the need for the application of objective evidence of public values with regards to this punishment.[671] Concurrently *Bessler* indicated that the death penalty runs afoul of core human rights values and if the abolition movement is to be successful, they will have to continue to struggle in the courts and before legislative bodies to achieve their objective.[672]

There is no doubt that the avenue which embraces the struggle in the courts has given rise to the doctrine of judicial politics in judicial reasoning as a pattern of abolition of the death penalty. This also can be deduced from the writing of *Hood and Hoyle* when they said that the new dynamic has seen countries marching from retention to abolition in an unprecedentedly short period of time.[673] Thus an individual variable analysis of

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[671] Karl M. Manheim, 'The Capital Punishment Case: A Criticism of Judicial Method' (1978) 12 Loyola of Los Angeles Law Review 85 – 134 at 93.

[672] John D. Bessler, 'The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions' (2018) 79 (7) Montana Law Review 8 – 48 at 47 – 48 said: ("If the abolition movement is to be successful, opponents of capital punishment will have to continue to struggle—in the courts and before legislative bodies—to achieve their objective: to put an end to a torturous practice that runs afoul of core human rights values such as human dignity and the rights to life and to be free of torture and inhuman and degrading treatment and punishment.").

[673] Roger Hood and Carolyn Hoyle, 'Abolishing the Death Penalty Worldwide: The Impact of a New Dynamic' (2009) 38 (1) Chicago Crime and Justice Journal 1 – 63 at 7 said: ("The new dynamic has seen countries marching from retention to abolition in an unprecedentedly short period of time as they come to embrace the view that capital punishment is not simply a weapon to be chosen by a state in response to its perceived and actual problems of crime but a punishment that fundamentally involves- and cannot be administered without- a denial of universal human right to be free from tortuous, cruel and inhuman punishment.").

the Privy Council decisions in the Commonwealth Caribbean constitutional appeals case will be made. This would be necessary in order to illustrate the concept of judicial politics within the pattern of judicial ideology in the decision making on the death penalty.

5.3: Analysing the impact of the Legal Model on the Delay of Execution

Table 5.1 presents much data on judicial pronouncements by the Privy Council on varying issues relating to the death penalty in the Commonwealth Caribbean. It is important to note that the judicial pronouncements on this issue can be traced back to many years ago. For all practical purposes, the legal approach on the constitutionality of delay in carrying out the sentence of death was dealt with in the *De Freitas* case.[674] In that case the appellant was convicted of murder in the High Court in the Republic of Trinidad and Tobago and was sentenced to death.

The appellant lost his appeals in the Court of Appeal and the Privy Council. He then filed an application for a declaration from the High Court claiming that the carrying out of the sentence of death would contravene his human rights as recognised under the Constitution, that is, his right to life. That application eventually reached the Privy Council where it was dismissed. In the ruling, Lord Diplock explained that the carrying out of the sentence of death which is pronounced by a court of law was not a breach of the appellant's constitutional rights.[675] This therefore was the rule of law on

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[674] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[675] *Ibid.*

the issue of the delay of execution and in that case, the legal model approach of the Privy Council was delivered by Lord Diplock who specifically said that the executive act of carrying out a death sentence pronounced by a court of law was authorised by laws that were in force at the commencement of the Constitution.[676]

The significance of this ruling shows that the Privy Council was concerned with the issue of the delay in the carrying out of the sentence of death. Clearly it shows its concern by demonstrating an understanding of the construction of the Constitution of the Republic of Trinidad and Tobago. In its expression, it indicated that if a court of competent jurisdiction orders the penalty of death on a person, then in the absence of any successful appeal, that person has no right, which can be infringed.[677]

Most interestingly however, the Privy Council in its deliberation on the breach of the constitutional rights of a condemned person, found difficulty in finding an argument for breach based on delay. Furthermore, the appellant could not complain about the delay caused by his own action in seeking redress through the appellate process.[678]

This approach by the Privy Council on the question of delay in carrying out the sentence of death seems to be in keeping with the spirit and intention of the rule of

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[676] *De Freitas v Benny* [1975] 27 WIR 318, PC it was held by Lord Diplock that ("the executive act of carrying out a death sentence pronounced by a court of law was authorised by laws that were in force at the commencement of the Constitution and the appellant was, therefore, debarred by section 3 of the Constitution from asserting that it abrogated, abridged or infringed any of his rights or freedoms recognised and declared in section 1 or particularised in section 2.").

[677] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[678] *Ibid.*

law in the Republic of Trinidad and Tobago. It describes the legal model approach on the issue of delay of execution and can be defined in light of *Beccaria's* retributive theoretical approach which suggests that punishment should be based on retributive reasoning because the guilty person had attacked another individual's rights.[679] This theoretical perspective signals that the due process of law does not end with the pronouncement of the sentence but it includes the carrying out of the sentence.

If the ruling in the *De Freitas* case[680] was to be accepted as an adequate analysis of the true spirit of the rule of law on the issue of delay of execution, then there will be grave difficulties in understanding the judicial approach behind the rulings of the Privy Council in later pronouncements on the same issue. It is for this reason that the legal model of the Privy Council on the issue of the delay of execution is worthy of further evaluation.

In the Commonwealth Caribbean States, the death penalty itself has also been challenged in the Courts as being cruel and therefore unconstitutional. This aspect of the constitutionality of the death penalty was tested in the said *De Freitas* case.[681] It was the first major challenge of the constitutionality of the death penalty in the region as being cruel. In the said case the court was asked, amongst other things, to declare

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[679] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[680] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[681] *Ibid.*

whether the imposition of the death penalty for murder was unconstitutional, and a breach of the appellant's human rights.[682]

Interestingly, after evaluating the relevant constitutional provision the Privy Council dismissed the appeal in the *De Freitas* case[683] and made the following comments: *"Their lordships are accordingly of the opinion that there is nothing in the Constitution which would render unlawful the carrying out of the death sentence on the appellant in the instant case."*[684]

This would signal the obvious reality that the act of carrying out a death sentence was not cruel and unconstitutional in the Republic of Trinidad and Tobago since it is provided for by the existing law.[685] In effect, the basic analysis to be identified from this case is that the death penalty is the legitimate punishment by the law of the State for persons guilty of the crime of murder and it ought to be carried out once the sentence was legitimately handed down and the convicted killer exhausted all legal remedies.

In the *Riley* case[686] the Privy Council was again called upon to give a ruling on the constitutionality of the death penalty. Following its deliberations, it approved the

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[682] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[683] *Ibid.*

[684] *Ibid.*

[685] Constitution of the Republic of Trinidad and Tobago, s. 6 (1).

[686] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

principle of law as delivered in the *De Freitas* case.[687] Lord Bridge of Harwich who delivered the opinion of the majority in that case was of the view that the validity of the death penalty was put beyond all doubt by the statutory provision that authorised its use.[688]

Naturally from this majority ruling it is clear that the Privy Council was in no doubt that the application of the death penalty within the Commonwealth Caribbean was lawful. By extension this would mean that the application of the death penalty was not unconstitutional.[689] However, analysis of the Privy Council's decisions on the death penalty demonstrated otherwise. The one major issue reflected in the cases presented in the aforementioned table 5.1 surround the concept of cruel and unusual punishment. It is worth noting *Bedau* comments in this regard when he said that given the unalterable nature of the death penalty itself, this kind of punishment even when carried out in most dignified fashion is a cruel and unusual punishment.[690] The extent of the severity of the death penalty as a punishment on the basis of cruelty would be further analysed in the next section.

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[687] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[688] Offences Against the Person Act 1864 of Jamaica, s. 3 (1).

[689] Ibid.

[690] Hugo Adam Bedau *Why the Death Penalty Is a Cruel and Unusual Punishment*, *The Death Penalty in America* (Oxford University Press 1997) 232 – 237 at 236 said: ("given the unalterable nature of the death penalty itself, this kind of punishment – even when carried out in most dignified fashion, on the most hardened offenders, for the most heinous crimes – exceeds the severity that society acting through its government may employed. Translated into the terms of the severity-limiting language of the Constitution, the death penalty thus is a cruel and unusual punishment.").

5.3.1: Analysing the impact of the Institutional Model on the Delay of Execution

In the *Abbott* case,[691] consideration was given to the issue of delay of execution. In that case the appellant was convicted of murder and was sentenced to death. Unfortunately, the appellant Stanley Abbott lost all his subsequent appeals both in the Court of Appeal and the Privy Council. He also failed in his bid to win the sympathy of the Mercy Committee in the Republic of Trinidad and Tobago. Subsequent to the issuing of a warrant for his execution in March 1977, the appellant filed a motion contending that under section 14 of the Constitution of the Republic of Trinidad and Tobago, the delay in carrying out the sentence of death between July 26, 1976 and March 12, 1977 would contravene his right to life which is guaranteed under section 4 (a) of the said Constitution.

The motion was dismissed by the High Court and the Court of Appeal in the Republic of Trinidad and Tobago and also by the Privy Council. The position of the Privy Council was clear in that it held that notwithstanding that there was some delay, such a delay did not contravene the constitutional right of the appellant.

However, what seems to be of paramount interest in the *Abbott* case[692] were the words of Lord Diplock who said that Their Lordships would hesitate long before substituting their own opinion for that of judges in Trinidad and Tobago as to what constitutes a

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[691] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[692] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC 1348 – 1349.

reasonable time since judges sitting in that country may take judicial notice of what was reasonable.[693] This opinion has serious implications on the part of the Privy Council as it demonstrated the adoption of the institutional model approach by following its own precedent and thus confirmed its earlier approach in the *De Freitas* case on the death penalty.[694]

It is also a demonstration of the rational choice theory as was suggested by *Beccaria* that the criminal is rational and that crime could be prevented through increased certainty, severity and celerity of punishment.[695] Certainly, in dismissing the appellant's motion, the Privy Council made its position abundantly clear, that is, that it is not prepared to entertain any question of delay in carrying out the sentence of death as being unreasonable and as being a violation of the constitutional rights of the condemned prisoner as the local judges would be better suited to make any determination of the reasonableness or not of any delay.[696]

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[693] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC 1348 – 1349 Lord Diplock who said: ("Their Lordships would in any event hesitate long before substituting their own opinion for that of judges in Trinidad and Tobago as to what constitutes a reasonable time for dealing with petitions for reprieve in that country. Judges who sit in the courts in Trinidad and Tobago know the practice in these matters and the local circumstances much better than their Lordships can hope to do ….if it lies within their knowledge, judges sitting in that country may take judicial notice in deciding whether the delay of seven and a half months in the instant case was reasonable or not.").

[694] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[695] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[696] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC 1348 – 1349.

Moreover, this declaration by Lord Diplock indicates both the reliance and confidence the Privy Council placed on local judges in the Republic of Trinidad and Tobago to decide the issue of reasonableness of any delay. However, in an article written by *Maguire et al* in a United Nations Caribbean Development Report,[697] it shares an opposing view of the justice system in the Republic of Trinidad and Tobago. It describes the justice system as dysfunctional and claims that there are significant delays and backlogs in the legal system of that state.[698]

However, from *Abbott's* ruling, the judicial paradigm of the Privy Council on this issue seems clear, and that is, in no way would it entertain that delay in carrying out the sentence of death is unconstitutional.[699] Further, if there was any doubt as regards the judicial approach which underpins the ruling given by the Privy Council in *Abbott's* case, then such a doubt would certainly have been cleared up in the *Riley* case.[700]

In that case, warrants for the execution of the appellants were issued in 1979, a period of approximately four years after they were sentenced to death. They then sought a declaration that under the Constitution their execution would be inhuman or degrading

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[697] United Nations Development Programme, *Caribbean Development Report* (United Nations Development Programme Panama Inversiones Gumo S.A 2012).

[698] Ibid.

[699] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC 1348 – 1349.

[700] *Riley and others v The Attorney General of Jamaica and Another* [1982] 35 WIR 279, PC.

punishment or other treatment by reason of the delay between the day of the sentence and the actual date carded for execution. The Privy Council through the institutional model approach could not have been clearer in its ruling when it followed the precedent in the *De Freitas* case.[701] It held that the delay in the execution of a sentence of death was no grounds for rendering the execution as being unconstitutional.[702]

Emanating from the *Riley* case[703] was the principle that delay cannot be used as a bar to the carrying out of the death penalty. This institutional model approach by the Privy Council has sent a well-directed signal to the Commonwealth Caribbean States. Such a signal encompasses the fact that it is prepared to ensure that the rule of law which was defined in the *De Freitas* case[704] be maintained and followed. In such a case, it ensures that the status quo on the application of the death penalty is satisfied. This therefore means that persons who are convicted of the crime of murder receive their just retribution and not seek to avoid it by invoking delay when they have exhausted all their judicial remedies.

Further to this, where the question of delay should arise, it should be left to the local courts as was illustrated in the *Abbott* case,[705] for determination since incidentally, the

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[701] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[702] *Riley and others v The Attorney General of Jamaica and Another* [1982] 35 WIR 279, PC.

[703] *Ibid.*

[704] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[705] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

courts would be in the best judicial position to do so.[706] In addition the institutional model approach on the law on delay in execution in the Commonwealth Caribbean was well illustrated in *Riley's* case.[707] In that case the Privy Council held that whatever the reasons for or the length of any delay in the execution of a sentence of death lawfully imposed, the delay could afford no ground for holding the execution to be inhuman or degrading or other treatment.[708]

However, in spite of the Privy Council rulings in the *Abbott* case[709] and the *Riley* case,[710] the issue of the delay in carrying out of the sentence of death as being unconstitutional still appears to be a thought provoking issue for the justices in the Privy Council. Moreover, from all apparent indications, this issue had not been settled. This is so in spite of the unequivocal and unambiguous rulings in both cases. The said issue was reviewed and similarly determined twenty five years later in *Reckley* case.[711] The Privy Council in those cases made expressions that are judicially contrived on the said issue. It clearly seems that those statements validate the presence of the researcher's analytic model of judicial politics.

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[706] *Riley and others v The Attorney General of Jamaica and Another* [1982] 35 WIR 279, PC.

[707] *Ibid.*

[708] *Ibid.*

[709] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[710] *Riley and others v The Attorney General of Jamaica and Another* [1982] 35 WIR 279, PC.

[711] *Reckley v Minister of Public Safety and Immigration and Others* [1995] 4 All ER 8, PC.

The decision in the *Reckley* case[712] is also interesting for its facts. That case arose out of The Bahamas where the petitioner was sentenced to death on November 7, 1990. He was due to be executed on May 30, 1995 when on May 29, 1995; he filed a constitutional motion that his right under Article 17 (1) of The Bahamas Constitution was infringed because of the delay in his execution.

The delay he complained of was four and a half years prior to the date of completion of his constitutional motion and he claimed that to execute him after this period of time would be inhuman or degrading punishment or treatment. The Privy Council was not convinced by his argument and in arriving at a decision; it followed the precedent in the *Pratt* case.[713] It ruled firstly, that the delay which occasioned in carrying out the sentence of death on the petitioner fell within the acceptable period of delay, that is, five years before it could amount to inhuman or degrading treatment.

Certainly, in the ruling in the *Reckley* case[714] it appears that the Privy Council has indeed settled the law in respect of the constitutionality of delay in carrying out the sentence of death. It stated that within the five year limitation, the sentence of death cannot be considered inhuman or degrading treatment. One would have thought that

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[712] *Reckley v Minister of Public Safety and Immigration and Others* [1995] 4 All ER 8, PC.

[713] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[714] *Reckley v Minister of Public Safety and Immigration and others* [1995] 4 All ER 8, PC.

following the decision in *Reckley's* case the issue of delay would not have created any further problems in the future.[715]

For instance, it is worth noting in the *Abbott* case,[716] that the Privy Council recognised that any inordinate delay might mean that the taking of the life of the condemned man would not be by the due process of law. It pointed out that States should maintain proper practice so that execution is not allowed after prolonged delay.[717] This point was well articulated by *Christopher* when he said that the interval must be brief in order to further the penological goals of punishment.[718]

5.3.2: Analysing the impact of the Attitudinal Model on the Delay of Execution

It is now unconstitutional for the Commonwealth Caribbean to carry out a sentence of death after a prolonged period of delay. This has been a fundamental issue with the death penalty in the region and is based on the jurisprudence emanating from the Privy Council on it. This jurisprudence identifies that at one time the concept of delay was not a factor affecting the death penalty.[719]

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[715] *Reckley v Minister of Public Safety and Immigration and others* [1995] 4 All ER 8, PC.

[716] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[717] *Ibid.*

[718] Russell L. Christopher, 'Absurdity and Excessively Delay Executions' (2016) 49 University of California, Davis 843 – 898 at 854 – 855 said: ("the interval must be brief because it is of great importance, that the punishment should follow the crime as early as possible in order to further the penological goals of punishment.").

[719] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

However, with the passage of time, delay in execution is now considered to be cruel and unconstitutional. This would suggest that although persons are convicted and sentenced to death it is quite possible to have the death sentence annulled as being cruel and unusual punishment based on the issue of delay of execution.[720] This is owing to the application of the attitudinal model approach which see a deviation from the status quo presented with the application of the institutional model approach.

Prior to the *Pratt* decision[721] in 1993 the law on delay in execution in the Commonwealth Caribbean was defined in *Riley's* case.[722] This law on delay in execution confirmed the decision in the *De Freitas* case and it stood for eleven years as good law. However, the Privy Council ignored this precedent and in 1993 there was a landmark decision in the *Pratt* case which changed the law.[723] The point to note is that nothing new developed that warranted this change except to suggest that the Privy Council through the concept of judicial politics set aside the earlier precedent. To a large extent, by the time of the *Pratt* decision,[724] the prominent conservative justices such as Lord Diplock, Lord Bridge and Lord Hailsham had left the Privy Council's bench and a new cadre of Law Lords such as Lords Griffith, Bingham and Steryn with liberal views and with different outlook on the law had replaced them.

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[720] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC.

[721] *Ibid.*

[722] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

[723] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[724] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

It should be noted that in the *Riley* case,[725] Lord Scarman and Lord Brightman in a dissenting judgment recognised that the delay in carrying out the death penalty is an inhuman and degrading punishment.[726] That judgement was made in spite of the unequivocal ruling given in the *De Freitas* case[727] on the issue of unreasonable delay. It is obvious that those utterances are a clear demonstration of the validity and credibility of the researcher's concept of judicial politics which embraces shrewd awareness of what seems expedient, advantageous or artful. This would suggest that the law on the delay in execution was not settled. It also showed a demonstration of the adoption of attitudinal model approach of the Privy Council towards the issue of delay in carrying out of the death penalty.

To compound this seemingly unsettled principle, Lord Templeman in *Bell v. Director of Public Prosecutions and Another* made a very important *obiter dicta* statement when he said that: *"Their Lordships do not in any event accept the submission that prior to the Constitution, the law of Jamaica, in applying the common law of England, was powerless to provide a remedy against unreasonable delay."*[728]

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[725] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

[726] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC [a] – [c] Lord Scarman and Lord Brightman said: ("Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be (in the circumstances which had arisen) inhuman and degrading.").

[727] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[728] *Bell v Director of Public Prosecutions and Another* [1985] 1 AC 937, PC 950 [c] – [d].

That *obiter dicta* statement had no effect on influencing the ruling of the Privy Council in this said case since it applied the strict rule of law which is provided for by section 20 (1) of the Jamaica Constitution. This provision confers on a person charged with a criminal offence, the right to a fair trial within a reasonable time. Accordingly, the constitutional right of the appellant was certainly infringed since his appeal was allowed as there was a six year delay in his retrial between 1979 and 1985, when the Court of Appeal ordered a new trial.[729]

A word of significance here is that this *obiter dicta* statement in *Bell's* case[730] as well as the dissenting judgement in *Riley's* case[731] shows a remarkable division of judicial opinion in the Privy Council on the issue of delay in carrying out the death sentence. That division heralds in the liberal approach where the Privy Council through its attitudinal model approach exhibited the propensity to deviate from the status quo in the principle of delay presented in the *De Freitas* case.[732] More importantly the issue was kept alive until the *Pratt* decision changed the scope of the law on the delay in carrying out the death penalty in the Commonwealth Caribbean for the future.[733]

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[729] *Bell v Director of Public Prosecutions and Another* [1985] 1 AC 937, PC.

[730] *Ibid.*

[731] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

[732] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[733] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

The facts in *Pratt's* case are very interesting.[734] In 1979, the appellants were convicted of a murder, which was committed in 1977. In 1980, the appellants' application for leave to appeal was rejected by the Court of Appeal in Jamaica. The reason for such a rejection by the Court of Appeal was not given until four years later. In 1986, the appellants made a special leave application to appeal to the Privy Council but this was refused. In 1991, they filed a constitutional motion under Article 17 of the Jamaican Constitution claiming that their detention under the sentence of death had contravened his right to life.

It must be noted that for fourteen years, the appellants were in custody awaiting their sentence. The reality is that in the *Pratt* case[735] the Privy Council had very little difficulty in adopting the *obiter dicta* statement of Lord Templeman in *Bell's* case,[736] the minority view of Lord Scarman and Lord Brightman in *Riley's* case and the concern raised in *Abbot's* case,[737] in ruling that prolonged delay in carrying out of the sentence of death was inhuman or degrading punishment or other treatment and a breach of the constitutional rights of the appellants.[738]

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[734] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[735] *Ibid.*

[736] *Bell v Director of Public Prosecutions and Another* [1985] 1 AC 937, PC.

[737] *Abbott v Attorney General of Trinidad and Tobago and Others* [1979] 1 WLR 1343, PC.

[738] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341.

Interestingly, the genesis of this ruling in the *Pratt* case[739] can be attributed to those cases where the Privy Council signalled its intention to deviate from the precedent in the *De Freitas* case[740] and the institutional model approach in the *Riley* case.[741] Moreover, it definitely shows a sequence of attitudinal approaches of shrewd awareness of what is expedient, advantageous or artful in arriving at the position in which there was an overruling of the precedent in the *De Freitas* case[742] and total rejection of the majority decision in *Riley's* case.[743]

The *Pratt's* decision had wide implications in the region, which has the death penalty as the punishment for persons convicted of murder and which still retains the Privy Council as their final judicial arbiter. These implications caused States in the region to wonder whether or not the Privy Council by its artful judicial manoeuvres was sending a signal to them and if so, what was the true lesson to be learnt from such a signal. The reason for such a situation is the fact that the Privy Council did not only rule on the issue before it, that the delay was unconstitutional, but it went further and gave directions for Commonwealth Caribbean States to follow.[744]

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[739] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC.

[740] *De Freitas v Benny*, [1975] 27 WIR 318, PC.

[741] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC.

[742] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[743] *Riley and others v The Attorney General of Jamaica and another* [1982] 35 WIR 279, PC 295.

[744] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341.

Its first direction dealt with the calculation of the period of delay. The Privy Council indicated that in calculating the period of delay, courts and indeed the States ought to take into consideration the period during which the convicted person is exercising his or her right of appeal. This seems to be diametrically opposed to the general position within individual States, which categorically disallows any sentence of death imposed by a court to be executed during the period in which the convicted person is exercising his or her right of appeal. For instance, in the Republic of Trinidad and Tobago this situation is provided for under *section 51 of the Supreme Court of Judicature Act Chapter 4:01*. Here it indicates that all appeals in the case of a conviction involving the sentence of death shall be heard before the sentence is executed.[745]

A further direction given by the Privy Council is that where there is a five year period between the sentence and the actual date carded for execution, thereafter such a period is considered as the delay which constitutes inhuman or degrading punishment or other treatment. This second implication seems to be more important of since it gave rise to the statement of law in *Pratt's* case[746] which illustrates that the death penalty must be carried out with all possible expedition if it is to be retained as the punishment for the crime of murder.[747]

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[745] Supreme Court of Judicature Act. Republic of Trinidad and Tobago. Chapter 4:01, s. 51.

[746] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341.

[747] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341 illustrates that ("If capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated at an early stage. Although no attempt is made to set a rigid timetable, the entire domestic appeal process should be completed within approximately two years. If in any case execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment.").

It must be noted that this statement of law provides a legal ground breaking record of judicial politics. In effect it illustrates the attitudinal approach of the Privy Council as regard addressing the issue of delay in constitutional matters reflecting the death penalty. This was an obvious deviation by justices of the Privy Council from the status quo which is following the institutional model approach. Thus the attitudinal model approach provides the tentative answer to the research question in this exploration.[748]

The *Pratt* case did not only address the querulous situation of prolonged delay but it further addressed the issue of avoiding the delay as a result of the directive given in it. This clearly demonstrated the Privy Council's willingness to gain an inroad into the legislative and policy making domain of states within the Commonwealth Caribbean. *Baum* defined such situation in his work on law and policy by indicating that it is easy for the Supreme Court justices to find legal justification for whatever positions they prefer since they care more about policy than law.[749]

It is worth noting that following those directions in the *Pratt* case,[750] a new dimension seems to be unfolding from the Privy Council on the issue of the constitutionality of

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[748] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341.

[749] Lawrence Baum, *The Puzzle of Judicial Behavior* (The University of Michigan Press *Ann Arbor* 2005) 1 – 230 at 64 defined such situation by indicating that the ("Supreme Court justices care more about policy than law, it is easy for them to find legal justification for whatever positions they prefer. But even if justices give a higher priority to legal accuracy, they have no choice but to decide between plausible arguments on the basis of their views about policy. In this way policy wins out as an operative goal no matter what weights the justices accord to legal and policy goals.").

[750] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

delay in carrying out the sentence of death. This new dimension is, in effect, a new judicial approach of the Privy Council which is in keeping with the theme of this research. Primarily it signals that if the death penalty is to be retained as a punishment for the crime of murder in the region, it must be carried out as expeditiously as possible. This obviously necessitates the demonstration of the shrewd awareness by the Privy Council for what is expeditious in the application of the death penalty.[751]

The principle of delay in execution was fuelled by the statement of law in the *Pratt* decision.[752] Since the decision in this case, there have been varying indifferent judgements on the issue of delay in execution.[753] This would suggest that there is no settled principle on the issue of delay and more importantly the concept of judicial politics is alive in the Privy Council.

This *Pratt* legal doctrine is a very powerful statement of law which is seen to address the delay in carrying out of the death penalty in the region. For this researcher, the judicial behaviour of the Privy Council in the *Pratt* case is the display of doctrinal-politics. It is clearly an exhibition of the attitudinal model approach of the legal doctrine of judicial politics by the Privy Council.[754]

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[751] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[752] *Ibid.*

[753] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[754] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

According to the last sentence within this principle a delay of five years or more between date of sentencing and the date carded for execution would be deemed cruel and indeed unconstitutional. One of the major impact of the *Pratt* decision is that it has overruled the decision in the *Riley's* case on delay.[755] Further, it illustrates that where there is delay in the judicial process, same would render the executive act of carrying out the death penalty cruel. Moreover, the statement of law has also demonstrated the Privy Council's attitudinal approach of overruling the precedent through the concept of judicial politics.[756]

Another impact of this statement for the region was that, persons under a death sentence for five years or more had their death sentence commuted to life imprisonment. In the Republic of Trinidad and Tobago fifty-two persons on death row were benefactors of this treatment. In Jamaica one hundred and five persons on death row had their death sentence commuted to life imprisonment.[757] However, the ultimate impact of the Privy Council's decision in *Pratt's* case[758] is a public policy one in that it has judicially directed the administration of the death penalty in the region.[759]

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[755] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[756] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[757] Michael De La Bastide 'The Case for a Caribbean Court of Appeal' (1995) 5 Caribbean Law Review. 401.

[758] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 362.

[759] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 362 directed that ("In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". It therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the

The general feature of the *Pratt* case[760] has been the liberal response by the Privy Council to the issue of delay in carrying out of the death penalty. This case has led to several similar challenges and ironically there has been an indifference of subsequent rulings on the said issue by the Privy Council. With these new cases, the Privy Council driven by judicial politics was able to have unfettered policy developmental approach on the concept of inhumanity or cruelty in the constitutionality of the death penalty.

For instance, in the *Guerra* case[761] which followed *Pratt's* case,[762] the Privy Council ruled that the period of four years and ten months which elapsed for the domestic appeal process was tantamount to cruel and unusual punishment.[763] The display of judicial politics by the Privy Council in terms of it attitudinal approach was also visible in this decision. This approach means that the justice system cannot be too swift and this would lead to believe that in effect the Privy Council has abolished the death penalty in the Commonwealth Caribbean. In that case the Privy Council further developed on the concept of cruelty. In order to justify its decision the Privy Council revaluated its ruling in *Pratt's* case[764] and claimed that this period was not specified

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Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment.").

[760] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[761] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[762] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[763] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[764] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

as a time limit but was given to enable the authority to expedite the death penalty matters.[765]

An interesting phenomenon about this judicial pronouncement is the fact that the Privy Council made such a ruling in the constitutional motion brought by the convicted killer Guerra even though it recognised that his crime was *one of shocking brutality.* It also endorsed the sentiment of the Court of Appeal in the Republic of Trinidad and Tobago by indicating also that the murders for which Guerra and Wallen were convicted were heinous and abominable in the extreme.[766] It is clear that the Privy Council's description of cruelty seems farfetched in comparison to the manner of its description of the crimes *Guerra* was convicted of.[767] This category of cruelty will be further analysed in the next section.

This indifference in the ruling on delay in execution was further exacerbated in the *Farrington* case. In that case, it was noticeable that the delay which *Farrington* complained of and the period which elapsed between the time he was sentenced and the time of his application was three years and four months.[768]

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[765] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 593 [d] said: ("It is to be observed that this period was not specified as a time limit. Its function was to enable the Jamaican authorities to deal expeditiously with the substantial number of prisoners, who had spent many years on death row, without having to deal with all such prisoners individually following constitutional proceedings.").

[766] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[767] *Ibid.*

[768] *Farrington v Minister of Public Safety and Immigration of The Bahamas* [1996] 49 WIR 1, PC.

Prima facie, if any court were to follow the established precedent in this case as in the decision of the *Pratt* case[769] and/or the decision of *Guerra's* case,[770] it would be a foregone conclusion that *Farrington* neither fulfilled the threshold of the five year period set out in the *Pratt* case[771] nor the minimum limit of four years and ten months set out in the *Guerra* case.[772] Nevertheless, in the Privy Council, their Lordships attitudinal approach was that there was a breach of *Farrington's* constitutional right. This was owing to the fact that delay of execution was measured alongside other factors which will be analysed in the next section and in *Farrington's* case it was based on the delay in the appellate process.[773]

5.4: Analysing the impact of the Attitudinal Model on the Swiftness of Execution

The jurisprudence on this issue suggests that the Privy Council was perplexed with the institutional systemic delay in the implementation of the death penalty. At the same time, it is less concerned with the perceived discrimination in judicial situations where appeals and petitions have been facilitated in order to avoid delays. With regard to institutional systemic delay, this was recognised in the decision in the *Pratt* case[774] and it seems that this factor had prompted the executive in the Republic of Trinidad

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[769] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[770] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[771] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[772] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[773] *Farrington v Minister of Public Safety and Immigration of The Bahamas* [1996] 49 WIR 1, PC.

[774] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

and Tobago to move post-haste to carry out the death sentence on *Guerra.* In relation to the death sentence in *Guerra's* case, he was given seventeen hours' notice of his execution. [775]

However, the execution was not effected since the issue of delay was again defined in *Guerra v. Baptiste and others.*[776] This is a case which originated out of the Republic of Trinidad and Tobago. In this case, the appellant was sentenced to death on May 18, 1989. He exhausted all his judicial remedies with respect of appeals and sought to avoid his retribution by way of a motion to the High Court claiming that executing him after a delay of four years and ten months was tantamount to cruel and unusual punishment which is contrary to section 5 (2) (b) of the Constitution of the Republic of Trinidad and Tobago.

It was not surprising that the local courts dismissed the appellant's motion as they clearly followed the precedent set out in the *Pratt* case as regards the five year limitation period.[777] However, when the petition came up for hearing in the Privy Council, they reversed the ruling given by the Court of Appeal in the Republic of Trinidad and Tobago and held that the delay in carrying out the sentence of death in this case constituted cruel and unusual punishment, and it was therefore unconstitutional.

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[775] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[776] *Ibid.*

[777] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

The significance of this ruling is that the Privy Council seemed to deviate from the strict timetable of five years laid down in the *Pratt* case[778] and it ruled that within the five year period the punishment can be considered as cruel and unconstitutional. However, what the Privy Council sought to explain here is that the five year time limit set in the *Pratt* case is a mere guideline.[779] Therefore, each case ought to be looked at on its own merit in order to determine whether or not the delay occasioned could be considered as unconstitutional.

Ironically, in *Guerra's* case[780] the Privy Council focused on the local systemic delay in the judicial process which has not conformed to the guidelines in the *Pratt* case and considered such a delay to have been unconstitutional. The point on which the Privy Council turned was the fact that the domestic appeal process that was outlined in the *Pratt* case of two years for completion was exceeded by a further two years and ten months. Although the outer limit of five years was not exceeded, the inner limit of two years for domestic appeals was exceeded.[781]

The Privy Council's attitudinal approach was that such a move was too swift and *Guerra* should have been given four days' notice of his impending execution which must include a weekend. In other words, the Privy Council has claimed that the

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[778] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[779] *Ibid.*

[780] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[781] *Ibid.*

swiftness of the execution was cruel and therefore a breach of section 5 (2) (b) of the Constitution of Trinidad and Tobago.[782] In furtherance of this position the Privy Council has identified its judicial preference of what it considered to be reasonable notice of time. Therefore, it stated that this principle of reasonable notice of time should be recognised and incorporated in the reading of the death penalty warrant.[783]

The essential difference with the *Guerra* case was that the appellate process was completed in four years and ten months, so that he did not have time to embark on the constitutional challenge.[784] The Privy Council pounced on that distinction to rigidly enforce the *Pratt* principle of two years for the local appellate process and three years for the constitutional challenges and petitions of reprieve.[785]

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[782] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 596 [d], [e] said: ("Their Lordships are of the opinion that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice is required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal. Their Lordships understand that this principle was long recognised in England in the days when capital punishment was still in force; and for reasons which will shortly appear, the like principle appears to have long been accepted in Trinidad and Tobago. In these circumstances they are satisfied that to execute a condemned man without first giving him such notice of his execution would constitute cruel and unusual punishment contrary to section 5 (2) (b) of the Constitution.").

[783] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 598 [b], [c] said: ("It follows that, in their Lordships' opinion, the due process of law requires that a reasonable time should be allowed to elapse between the reading of the warrant of execution and the execution itself, not only for humanitarian purposes which their Lordships have previously described, but also to provide a reasonable opportunity for the condemned man to take advice and if necessary seek relief from the courts. The settled practice that a period of at least four clear days (including weekends) will be necessary to constitute such reasonable time should be regarded as applicable as much to the latter purpose as to the former.").

[784] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[785] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC. 598.

It should also be noted that had the execution been carried out on *Guerra* it would have been within the five years' time limit as was prescribed in *Pratt's* principle of swift punishment.[786] Moreover, it would certainly have been carried out in conjunction and within the ambit of the theoretical perspective from *Beccaria's* theory of society which states that the punishment must be a certainty, inflicted quickly, and should not be administered to set example; neither should it be concerned with reforming the offender.[787]

In addition, its application would have subscribed to the concepts in the research theoretical perspective which suggested that its essential characteristic is that it must be consistent with the current features within contemporary jurisprudence, that is to say, it ought to be administered quickly. *(See research theory in ch3).* However, the fact that the reading of the death penalty warrant did not conform to the Privy Council attitudinal approach of reasonable notice of time then such practice is considered cruel and unconstitutional, thereby rendering the death sentence commuted to life imprisonment.

Interestingly, the Privy Council applied the said concept of systemic delay in the case *Farrington v. The Attorney General of the Commonwealth of The Bahamas*[788] in order to determine whether or not there was a breach of the appellant's constitutional rights

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[786] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[787] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[788] *Farrington v The Attorney General of the Commonwealth of The Bahamas* (1996), 49 WIR 1, PC.

occasioned by the delay in carrying out the sentence of death. In that case, the appellant was convicted of murder in The Bahamas on November 30, 1992. Both his appeals to the Court of Appeal and the Privy Council were dismissed on April 28, 1994 and September 7, 1995, respectively. On March 27, 1996, a warrant was read to him for his execution on April 9, 1996 and he filed a motion that the time, which had elapsed since he was sentenced to death constituted inhuman punishment which was a clear violation of Article 17 (i) of The Bahamas Constitution. It must be noted that the delay which he complained of and the period which elapsed between the time he was sentenced to death and the time of his application to the court was three years and four months.

Prima facie, if any court were to follow the precedent such as the decision in *Pratt* case[789] and or the decision of *Guerra's* case,[790] it would have been a foregone conclusion that *Farrington* neither fulfilled the time limit of the five year period set out in the *Pratt* case nor the minimum threshold of four years and ten month period set out in the *Guerra* case.[791]

Although the Court of Appeal in The Bahamas had very little difficulty with such recognition and dismissed the appeal, the situation was certainly different when the appellant's appeal was heard in the Privy Council. Their Lordships exhibited the

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[789] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[790] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[791] *Ibid.*

attitudinal model approach by identifying with the period of delay, which did not accommodate the target period for the relevant appellate procedure. That period which affected the case in question was eighteen months and the Privy Council considered it to be substantial enough to be a breach of the appellant's constitutional right.[792]

On the other hand the judgement in the *Boodram* case[793] presents an opposite reflection of cruelty in the category of swiftness of execution. The appellants in that case complained that their appeals against conviction and their petitions to the human rights organisations had been facilitated and enabled to be determined without being subjected to the delays which had been experienced by other persons convicted of murder. This assertion would suggest that swift execution was facilitated through the means of judicial discrimination.

In that case the Privy Council upheld the decision of the Court of Appeal in the Republic of Trinidad and Tobago that the appeal had no substance since there was no breach of the appellants' constitutional rights. The appellants in this judgement are now history since they were eventually executed in June 1999. However, history may very well judge the appellants to have been discriminated against since they too would have benefited from the *Roodal decision.* This is evident from the fact that four years

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[792] *Farrington v The Attorney General of the Commonwealth of The Bahamas* (1996) 49 WIR 1, PC.

[793] *Boodram and Others v Baptiste and Others* (No. 2) [1999] 55 WIR 404, PC.

later following the judgement in the *Matthew* case[794] and based on the principle in the *Roodal* case[795] fifty prisoners on death sentence in the Republic of Trinidad and Tobago had their sentence commuted to life imprisonment.

Although the decision in the *Roodal* case[796] was eventually overruled by the *Matthew* case,[797] the Privy Council has displayed its attitudinal approach that it would be cruel and unusual punishment to reinstate the death penalty. This was because of their legitimate expectation that as a result of the *Roodal* case they would have been entitled to a re-sentencing hearing before a judge.[798]

Lord Hoffman strongly denounced the attitudinal model approach of the Privy Council in a dissenting judgment, cited before, in *Lewis et al v. Attorney General of Jamaica and another*.[799] That statement of Lord Hoffman, though a dissenting one, naturally sums up the current attitudinal approach of the Privy Council towards the constitutionality of death penalty in the Commonwealth Caribbean. In effect, this statement subscribes to the current research concept. Moreover, it validates the notion

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[794] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[795] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[796] *Ibid.*

[797] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[798] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[799] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC. Lord Hoffman strongly denounced the attitudinal model approach saying that ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

that the death penalty in the region evolved through judicial politics. Most importantly it is a reliable and leading indicator from within the Privy Council itself that its own rulings on the constitutionality of the death penalty within the Commonwealth Caribbean are fraught with politics.[800]

Smith on his writing on the Supreme Court and the politics of death took a similar position to Lord Hoffman concerning the United States of America Supreme Court decision in the Furman case.[801] He said that by constitutionalizing capital punishment, the Court in-advertently politicized it, and the political process quickly responded with new death penalty schemes crafted to correct the defects identified in Furman.[802]

Thus by comparison of the impact of delay of execution and swiftness of execution, both illustrate the Privy Council's restrictive approach for the death penalty in the Commonwealth Caribbean. They not only affect the nature of the death penalty in the

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[800] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC. Lord Hoffman strongly denounced the attitudinal model approach saying that ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

[801] *Furman v Georgia,* 408 U.S. 238 (1972).

[802] Stephen F. Smith, 'The Supreme Court and the Politics of Death' (2008) 94 (2) Virginia Law Review 283 – 383 at 380 – 381 indicated that: ("Throughout the last three decades of regulating capital punishment, the Supreme Court has progressively become savvier about the politics of the death penalty. At the beginning of this enterprise, the Court seemed to think that it could just point the way to what it regarded as a better future-a future in which the death penalty was relegated to the ash heap of American history-and the country would dutifully fall in line. Accordingly, the Court gave the nation a stern lecture in Furman v. Georgia about the many problems inherent in the death penalty. The decision sent shock-waves through the country, but it is the Court that has been reeling ever since. By constitutionalizing capital punishment, the Court in-advertently politicized it, and the political process quickly responded with new death penalty schemes crafted to correct the defects identified in Furman.").

region but display the institutional and attitudinal approaches of the Privy Council. Thus, whether there is delay in execution or there is swiftness of execution, both will render the death penalty being ruled inhuman or cruel and therefore unconstitutional.[803]

In summary this clearly is a no win situation and as such a leading indicator of the effects and impacts of the legal doctrine of judicial politics in the Privy Council decision making on the constitutionality of the death penalty in the Commonwealth Caribbean. Moreover, it is a demonstration of a dichotomy between the *Guerra's* principle of swiftness of execution.[804] It clearly runs counter to an aspect or the part of the *Pratt's* legal doctrine which states that if capital punishment is to be retained it must be carried out with all possible expedition and the capital appeals must be expedited and legal aid allocated at an early stage.[805]

Such a dichotomy presented a deeper and more fundamental problem associated with the decision making in the Privy Council which is the lack of regional contribution to the judgement. Accordingly, *Maharajh* illustrated this when he said that the Privy Council has attracted a lot of criticism for the fact that it encompasses such a large number of judges but it is difficult for the Caribbean voice to gain a majority because

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[803] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC and *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[804] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC.

[805] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341.

only a limited number of people from the region are used on appeal.[806] This therefore means that the development of the Commonwealth Caribbean jurisprudence through the Privy Council is achieved without any regional contribution.

5.5: Analysing the impact of the Attitudinal Model on Mandatory or Discretionary Death Sentence

In the discussion on the constitutionality of the death penalty in this research, it was illustrated that by reason of statutes the death penalty was mandatory for persons convicted of murder in two Commonwealth Caribbean States.[807] It should be noted also that in other States in this region the death penalty is discretionary.[808]

Writing on the subject of the mandatory death penalty, *Kadri* indicated that the courts have repeatedly emphasised that a mandatory death penalty rule is objectionable no matter how grave the crime committed.[809] Therefore, the mandatory and discretionary natures of the death penalty were tested in the courts in which there were several

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[806] Andrew N. Maharajh, 'The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court' (2014) 47 Cornell International Law Journal, 736 – 766 at 740 said: ("The Privy Council has attracted a lot of criticism for the fact that it encompasses such a large number of judges and only uses a fraction of them for any one appeal. Thus, the decision for any one case depends, to a large extent, on the judges called; the number of combinations of judges available means that different decisions could be rendered for very similar fact patterns. This issue becomes especially relevant when an appeal comes from a Caribbean country. With only roughly three Caribbean Privy Councillors and a panel of at least five judges sitting for appeals from the Caribbean, simple math dictates that it is difficult for the Caribbean voice to gain a majority.").

[807] Offences Against The Persons Act of the Republic of Trinidad and Tobago Chapter 11:08 s. 4 and Constitution (Amendment) Act of Barbados 2003.

[808] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[809] Sadakat Kadri, 'Force to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial standards' (2016) A report of the International Bar Association's Human Rights Institute 1 – 27 at 11.

judicial pronouncements. An evaluation of the judicial pronouncements on the two issues would suggest that the Privy Council through its attitudinal model approach demonstrates a judicial preference for treating the death penalty as being discretionary.

It should be noted that this preference is based on the one hand the Privy Council's paradigm which illustrates that the mandatory death penalty is a cruel and unusual punishment.[810] On the other hand, it is based on the Privy Council's interpretation of international convention and decisions and the adoption of comparative international law into the domestic law in the region.[811] Moreover, it was held that there was no defence to violate international obligations under a duly ratified treaty even though the death penalty had not yet been found unconstitutional in the respective domestic legal system.[812]

In this discourse, the presentation of the issue revolving around the mandatory or discretionary death sentence is viewed from the perspectives of the situation adopted in the Eastern and Southern Caribbean States. The leading trilogy of cases on this issue originated in the Eastern Caribbean States and also in the country of Belize. They

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[810] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[811] American Convention on Human Rights, Article 4 of the and The Inter-American Court of Human Rights in *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* 21 June 2002 (Ser. C No. 94 [2002].

[812] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* 21 June 2002 Ser. C No. 94 [2002].

were the *Hughes* case,[813] the *Fox* case[814] and the *Reyes* case.[815] The Privy Council was asked in each of those cases to determine whether a mandatory sentence of death was an inhuman or degrading punishment or treatment.[816]

Their Lordships in the Privy Council, in response, held that the mandatory death penalty was inconsistent with the Constitution. In arriving at this decision their Lordships interpreted the death penalty law with the modifications provided for in the Constitution and proclaimed that on a conviction for murder the prisoner may be sentenced to death or else he may be sentenced to a lesser punishment.[817] Thus, it is for the trial judge to determine the appropriate sentence based on the circumstances that exist. Moreover, in determining the appropriate sentence the judge must hear submissions relevant to the choice of sentence.[818]

The ultimate effect of the decision in those cases is that the Privy Council ruled that the death penalty is discretionary rather than mandatory for persons convicted of murder. More importantly this ruling subscribes to the concept of judicial politics

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[813] *Hughes v The Queen* [2002] 2 AC 284, PC.

[814] *Fox v The Queen* [2002] 2 AC 259, PC.

[815] *Reyes v The Queen* [2002] 2 AC 235, PC.

[816] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[817] Constitution of St. Lucia, s. 2; Constitution of St. Kitts (Christopher) and Nevis, s. 2 and Constitution of Belize, s. 134 (1).

[818] Ibid.

advanced in the research, whereby the Privy Council through its attitudinal model approach has created another exception of discretionary death sentence for the Commonwealth Caribbean region.[819]

Such an exception is based on the notion that the mandatory death penalty is considered to be inhuman or degrading punishment or treatment by their Lordships in the Privy Council. The obvious ideology at work here is the concept of judicial politics whereby the Privy Council exhibits a liberal stance and decides the matters according to its judicial preferences. Thus it has restricted the death penalty in the Eastern Caribbean States and in Belize on the basis that it is inconsistent with the Constitution.[820]

It is worth noting that the Privy Council's decision goes against the spirit of *Beccaria's* theory of society perspectives which suggest that the punishment must be a certainty, inflicted quickly, and should not be administered to set example; neither should it be concerned with reforming the offender.[821] *Beccaria* also suggested that the complete criminal law code should be written and all offences and punishment should be defined

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[819] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v. The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

[820] *Ibid.*

[821] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont, California 2004) 30.

in advance.[822] In other words, this later theoretical perspective suggests that punishments were to be decided by the legislature and not by the court.[823]

In the Southern Caribbean States there are two cases of interest which can be identified with the Privy Council's judicial preference for the discretion in the administration of the death penalty. These two cases are the *Roodal* case[824] and the *Matthew* case[825] both of which emanated from the Republic of Trinidad and Tobago. Moreover, those cases also identify with the Privy Council's ideology that the death penalty is considered to be cruel.

In the *Roodal* case the Privy Council held by a majority of 3 to 2 that the mandatory death penalty in the Republic of Trinidad and Tobago was unconstitutional.[826] In arriving at this decision the Privy Council recognised the fact that the Republic of Trinidad and Tobago was a signatory to the American Convention of Human Rights. Accordingly, it showed judicial preference for article 4. 2 of the Convention which proclaims that the death sentence may only be imposed for the most serious crimes.[827]

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[822] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont, California 2004) 30.

[823] Ibid.

[824] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[825] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[826] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[827] Organization of American States General Secretariat, 'American Convention on Human Rights' (Organization of American States San Jose Costa Rica 1969).

The Privy Council further recognised the interpretation of this Convention given by the Inter-American Court of Human Rights which suggests that a mandatory death sentence is inconsistent with article 4.2 of the Convention.[828] In fact it did not make any distinction but found that all mandatory death sentences are unconstitutional. More importantly the mandatory nature of the death penalty made it a cruel, inhuman and degrading punishment.[829]

The Privy Council's attitudinal approach on this issue suggested that an interpretation of the mandatory death penalty in the Republic of Trinidad and Tobago should be consistent with the Convention as determined by the Inter-American Court of Human Rights. Therefore, it concludes that in light of the Constitution and the international obligations the penalty of death for persons convicted of murder is the maximum penalty which means that it is a discretionary punishment.[830]

This decision did not stand for long and the *Matthew* case which followed, overruled it by a slim majority of 5 to 4.[831] In its decision, the Privy Council held that the mandatory death penalty is saved by the existing law under section 6 (1) of the Constitution of the Republic of Trinidad and Tobago and therefore is prevented from being declared unconstitutional. This is so despite the fact that it is not consistent with

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[828] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* 21 June 2002, Ser. C No. 94 [2002].

[829] Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2012b) XLV Suffolk University Law Review 285 – 356 at 293 – 300.

[830] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[831] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

the current interpretation of the various Human Rights treaties to which the Republic of Trinidad and Tobago is a party.[832]

The impact of the ruling in the *Matthew* case is a leading indicator that the Privy Council decisions on the constitutionality of the death penalty is linked to judicial politics.[833] Firstly, in that said case the Privy Council has revalidated the death penalty in the Republic of Trinidad and Tobago as being mandatory. Secondly, it also confirms that the death penalty could only be abolished by the Parliament through the means provided in the Constitution. It must also be noted that although the Privy Council overruled the decision in the *Roodal* case[834] it also recognised the concept of cruelty of the death penalty which was featured in that case.[835]

Thirdly, this statement clearly demonstrates the attitudinal model approach of the Privy Council that it has a judicial preference for a discretionary death penalty rather than its mandatory nature. In order to present the feelings of the Privy Council on the issue of the mandatory death penalty, their Lordships stated that *"they do not think it would be fair to deprive anyone presently under sentence of death of the benefit of the*

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[832] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* 21 June 2002, Ser. C No. 94 [2002].

[833] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[834] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[835] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC stated that ("Their Lordships consider that for reasons similar to those given in *Reyes v. The Queen,* [2002] 2 AC. 235 and *Boyce and Joseph v The* Queen the mandatory death penalty is a cruel and unusual punishment and therefore inconsistent with sections 4 (a) and 5 (2) (b) of the Constitution.").

Roodal decision. They will accordingly allow the appeal against sentence and substitute a sentence of imprisonment for life.'[836]

Thus the impact of the *Matthew* case[837] was that it afforded some fifty prisoners on death row in the Republic of Trinidad and Tobago the benefit of having their sentence commuted to life imprisonment. These were prisoners who were at the date of the *Matthew case* already sentenced to death.[838] In this regard, *Cross* writing on the subject of the de facto abolition of the mandatory death penalty, said that the judicial precedents have resulted in a de facto repeal of the mandatory death penalty in the Commonwealth Caribbean countries.*[839]*

This statement by *Cross* is in realty a validation of the judicial politics concept presented herein and it is worth noting that it revolves around the attitudinal model approach of the Privy Council whereby it adopted a judicial preference for the discretionary death. This is naturally a similar approach to that of the approach of the Inter-American Court of Human Rights. Its model is a presumption against the death penalty so that life sentence is the norm and the death penalty is the exception which

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[836] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[837] *Ibid.*

[838] *Ibid.*

[839] Jane E. Cross, 'A Matter of Discretion The De facto Abolition of the Mandatory Death Penalty in Barbados – A Study of the Boyce and Joseph Cases' (2014) 46 (1) Inter-American Law Review 39 – 59 at 58 - 59 said: ("The resulting precedents have resulted in a de facto repeal of the MDP in Barbados and other Commonwealth Caribbean countries through the diligent infusion of due process and human rights principles into post sentencing mandatory penalty death proceedings.").

has to be justified in rare cases by exceptional heinousness of the murder and lack of individual mitigation situation in the offender.[840]

Moreover, this approach of the Privy Council is evidence of the application of comparative international law which articulates the progressive abolition of the death penalty. This has been the international model hypothesis to this research and is located in Resolution 32/61 which was adopted at the thirty-second session by the General Assembly of the United Nations.[841]

The *Trimmingham* case[842] is essential in this category of cruelty. In that case, the appellant Daniel Dick Trimmingham was convicted for the murder of Albert Browne of St. Vincent and was sentenced to death. At the time of the murder the appellant had a firearm and robbed the victim Albert Browne aged 68 years of six goats. He then slit the victim's throat and cut off his head. The appellant then slit the victim's belly, covered the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field.[843]

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[840] Jane E. Cross, 'A Matter of Discretion The De facto Abolition of the Mandatory Death Penalty in Barbados – A Study of the Boyce and Joseph Cases' (2014) 46 (1) Inter-American Law Review 39 – 59 at 58 - 59 said: ("The resulting precedents have resulted in a de facto repeal of the MDP in Barbados and other Commonwealth Caribbean countries through the diligent infusion of due process and human rights principles into post sentencing mandatory penalty death proceedings.").

[841] United Nations General Assembly, *Resolution 32/61* (Adopted 8th December 1977 9th plenary meeting, 32 Session United Nations General Assembly New York 1977).

[842] *Trimmingham v The Queen* [2009] UK PC 25.

[843] *Ibid.*

The facts in *Trimmingham* case[844] would suggest that he had satisfied the criteria for the discretionary death penalty based on the provision of article 4. 2 of the Inter-American Convention which proclaims that the death sentence may only be imposed for the most serious crimes.[845] However, the Privy Council in *Trimmingham* case held that it was not comparable with the worst cases of sadistic killings.[846]

This pronouncement is evident of the application of attitudinal model approach by the Privy Council. It has shown its judicial preference by lifting the bar very high for the discretionary death penalty in cases where there is no mandatory sentencing. The bare facts in this case are enough for one to think that *Trimmingham* was qualified for the discretionary death penalty. However, given the decision in this case it is now virtually impractical for the death penalty to be carried out in the region since the bar for this punishment is now extremely high.[847]

This is made possible whereby the Privy Council adopted international law to guide its deliberation in domestic matters. In this regard it is worth noting article 6 of the International Covenant on Civil and Political Rights (ICCPR) in 1976, in which the death penalty is carefully described as an exception to the right to life. Paragraph 2 of

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[844] *Trimmingham v The Queen* [2009] UK PC 25.

[845] Organization of American States General Secretariat, American Convention on Human Rights (Organization of American States San Jose Costa Rica 1969).

[846] *Trimmingham v The Queen* [2009] UK PC 25 said: ("The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him.").

[847] *Ibid.*

that said article proclaims that: "*In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.''*[848]

In this research perspective the objective academic conclusion that can be derived here is that through its attitudinal model approach of judicial behaviour the Privy Council has restricted the death penalty in the region. A similar position was articulated by *Novak* who in a research on the global decline of the mandatory death penalty indicated that the death penalty has declined rapidly in the English-speaking world to the point of extinction in the Commonwealth .[849]

5.6: Analysing the impact of the Legal Model on Prison Conditions

In dealing with the issue of prison conditions it is necessary to have an understanding of the manner in which an inmate was detained while under a sentence of death. The Inter-American Commission on Human Rights (2011) in its report on *'The Death Penalty in the Inter-American Human Rights System: From Restrictions To Abolition'* indicated its expectation for the death penalty in terms of the right to humane treatment and punishment.[850] It suggested in that report that under the conditions on death row

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[848] Article 6 of the International Covenant on Civil and Political Rights (ICCPR) in 1976.

[849] Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia and the Caribbean* (Routledge, Taylor and Francis group 2014) 1 – 177 at 1 indicated that ("The death penalty is in rapid and irreversible retreat everywhere in the English-speaking world, even in the most intransigent holdout like Texas and Singapore. The common law mandatory death sentence, automatic upon conviction for homicide or a small number of other serious felonies, has declined faster than this, to the point of extinction in the Commonwealth.").

[850] Santiago A. Canton, Executive Secretary: *The Death Penalty in the Inter-American Human Rights System: From Restrictions* (The Inter-American Commission on Human Rights 2011) 1 - 201.

States have the obligation to provide adequate prison conditions in keeping with the minimum international standards.[851]

In the case *Thomas and Another*[852] the issue of prison condition in terms of the obligation of the State was addressed. In that case the appellants were convicted of murder and sentenced to death in the High Court in the Republic of Trinidad and Tobago. That sentence was subsequently confirmed in that country's Court of Appeal.

In October 1997, the Government of the Republic of Trinidad and Tobago issued a series of instructions relating to persons with applications before the Inter-American Commission of Human Rights and the United Nations Human Rights Committee.[853] The appellants in the case *Thomas and Another,*[854] filed a constitutional motion and in the High Court the death sentence against Thomas was vacated. The state appealed this decision and the Court of Appeal allowed the appeal and reinstated the death penalty.

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[851] Santiago A. Canton, Executive Secretary: *The Death Penalty in the Inter-American Human Rights System: From Restrictions* (The Inter-American Commission on Human Rights 2011) 1 – 201 at 176 stated that ("States have the obligation, as guarantors of the rights of people under their custody, to provide adequate prison conditions, as interpreted in light of minimum international standards in this area. All detained persons have the right to live in conditions compatible with the inherent dignity of every human being. This entails a duty upon States to ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention, and that the detainees' health and welfare are adequately safeguarded. A failure to do so may result in a violation of the absolute prohibition of cruel, inhuman or degrading punishment or treatment.").

[852] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

[853] Gazette of the Republic of Trinidad and Tobago, October 13, 1997.

[854] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

There was a further appeal to the Privy Council and that institution was very reluctant to set aside a death sentence based on the fact that prison conditions were cruel. Thus the legal position of the Privy Council on the issue of prison conditions as was presented in the *Thomas 'and Another case* illustrated that: *"Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy."*[855]

Thus, the Privy Council's legal model paradigm on prison conditions as it relates to the death penalty seems to suggest that any prolonged period that echoes down in years is deemed to be cruel. However, prison condition in itself would not necessarily lead to the commutation of the death sentence to life imprisonment.[856]

5.6.1: Analysing the impact of the Attitudinal Model on Prison Conditions

It has been contended subsequently that prison conditions coupled with the manner in which the prisoner is treated constitute cruelty within the meaning of the Constitution and this could allow the death sentence to be commuted to life imprisonment. There is evidence that the Privy Council has been deeply concerned with prison conditions in the context where the prisoner has been held under a sentence of death for many years. This judicial institution recognised that such a period in terms of years of incarceration can be deemed cruel or inhuman in relation to the application of the

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[855] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC 427.

[856] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

death penalty. The Privy Council's paradigm in this regard was disclosed in *Pratt* case which indicated that it is an inhuman act to keep a man facing the agony of execution over a long extended period of time.[857]

This protracted period of time in prison, the Privy Council described as the death row phenomenon. In the *Pratt* case[858] it expressed that the notion of the death row phenomenon should not be part of the jurisprudence in the Commonwealth Caribbean. This obvious judicial condemnation of prison conditions by the Privy Council is based primarily on our humanity. This assessment can also be gleaned from the Privy Council attitudinal approach in the *Pratt* case in which it was stated that the death row phenomenon must not become established as a part of our jurisprudence.[859]

It is clear that this is a judicially contrived statement made by the Privy Council which seems to overlook the appellate procedures in the region that implicitly allow for a period of delay for appellants to seek legitimate resort. For instance in the Republic

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[857] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 356, Lord Griffith said: ("There is an instructive revulsion against the prospect of hanging a man after he has been under sentence of death for many years. What gives rise to this instructive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.").

[858] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[859] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 359 Lord Griffith said: ("In their lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.").

of Trinidad and Tobago delay in execution is implicitly provided for under section 51 of the Supreme Court of Judicature Act Chapter 4 : 01. This provision indicates that all appeals in the case of a conviction involving the sentence of death shall be heard before the sentence is executed.[860] However, in spite of this statutory authority the Privy Council suggested that the period of delay in execution which is echoed down in years would be deemed cruel and unconstitutional according to the *Pratt* decision.[861]

The Privy Council although perplexed with the prison conditions in the Commonwealth Caribbean, which it considered were unacceptable in a civilised society, was however reluctant to set aside a death sentence based on the fact that it was cruel. That position was short lived as the Privy Council in the *Lewis* case[862] demonstrated its attitudinal model approach by ignoring and overruling the decision in the *Thomas and Another* case[863] on the issue of prison conditions. It held that prison conditions amounted to inhuman and degrading treatment. Thus in the *Lewis* case the Privy Council deviated from the precedent in the *Thomas* case and allowed the appellants appeal on the said issue of prison condition.[864]

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[860] Supreme Court of Judicature Act of Trinidad and Tobago Chapter 4 : 01. s.51.

[861] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 359.

[862] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[863] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

[864] *Ibid.*

5.7: Analysing the impact of the Legal Model on Ministerial Advice prior to Execution

In addressing this issue in the *De Freitas* case Lord Diplock made the famous but interesting statement that: '*Mercy is not subject to legal rights. It begins where legal rights end.'*[865] It is for this reason that the Privy Council held in the *De Freitas* case that: *"the appellant had no legal right to have disclosed to him the material furnished to the advisory committee and to the Minister on which the Minister tendered advice to the Governor-General as to the exercise of the prerogative of mercy as the exercise of the royal prerogative was solely discretionary and not quasi-judicial."*[866]

This pronouncement by the Privy Council in the *De Freitas* case[867] is the legal model approach which indicates that since the function of the Minister is discretionary then there could be no challenge by way of judicial review to the advice given to the Advisory Committee on Mercy. This has been the clear legal position taken by the Privy Council on the issue of ministerial advice given prior to execution.

5.7.1: Analysing the impact of the Institutional Model on Ministerial Advice prior to Execution

The Privy Council in the *Reckley* case (No. 2)[868] was again asked to make a determination on the issue dealing with whether the ministerial advice would be

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[865] *De Freitas v Benny* [1975] 27 WIR 318, PC 394.

[866] *De Freitas v Benny* [1975] 27 WIR 318, PC 389.

[867] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[868] *Reckley v Minister of Public Safety and Immigration and others* (No. 2) [1996] 1 All ER 562, PC.

subject to judicial review, a similar issue to that decided in the *De Freitas* case.[869] In that case, the Privy Council confirmed and maintained that its earlier decision in the *De Freitas* case remained good law.[870] This clearly validates the institutional model approach whereby the Privy Council followed the precedent on the issue of ministerial advice prior to execution.

Moreover, it also held in *Reckley's* case (No. 2) that, in The Bahamas, ministerial advice was not amenable to judicial review, since the prerogative of mercy was not by its nature the subject of legal rights, but began where legal rights ended. It further indicated that the designated Minister's exercise of his personal discretion whether to advise the Governor-General that the law should or should not take its course was not justiciable.[871]

5.7.2: Analysing the impact of the Attitudinal Model on Ministerial Advice prior to Execution

Although the Privy Council in *Reckley's* case (No. 2) [872] confirmed the decision in the *De Freitas* case[873] it took a liberal stance and decided this issue differently in the *Lewis case.*[874] In the *Lewis* case it was held that mercy can no longer be regarded as totally

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[869] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[870] *Ibid.*

[871] *Reckley v Minister of Public Safety and Immigration and others* (No. 2) [1996] 1 All ER 562, PC.

[872] *Ibid.*

[873] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[874] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

personal and discretionary. In delivering the decision Lord Slynn demonstrated the attitudinal model approach and declared that: "*The merits are not for the courts to review. It does not at all follow that the whole process is beyond review by the courts."*[875]

This has been another issue in which the Privy Council sought to define the term *cruelty.* In the context of the implementation of the death penalty this issue was raised and answered in the *Lewis* case.[876] The issue embraced a prerogative challenge in the High Court of the advice given to the advisory body on mercy, to the Head of State based on procedural impropriety. This procedural impropriety would be limited to the advice given by the appropriate Minister to the Advisory Committee on Mercy.[877]

In the *Lewis* case[878] the Court was in reality asked to review the legal model approach taken in the decision in the *De Freitas* case[879] as both cases were adjudicated on the same issue. The applicable issue which the Privy Council was asked to deal with in the cases was whether on a petition for mercy the appellants are entitled to know what material the Jamaican Privy Council had before it and to make representations as to

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[875] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[876] *Ibid.*

[877] Constitution of the Republic of Trinidad and Tobago, s. 89.

[878] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[879] *De Freitas v Benny* [1975] 27 WIR 318, PC.

why mercy should be granted. In this matter the Privy Council clearly deviated from following the precedent.

In this regard, through its attitudinal model the Privy Council's approach held that a defect in procedure resulting from a breach of the rules of fairness, and of natural justice can give rise to a challenge to ministerial advice through judicial review. This would suggest that it would be cruel and unconstitutional for the prerogative of mercy to be exercised other than in accordance with the rights enshrined in the Constitution. According to the *Lewis* case where a fundamental breach exists there could be no justification for excluding judicial review of ministerial advice.[880]

5.8: Analysing the impact of the Legal Model on the Opinion of International Human Rights Organisations

In some Commonwealth Caribbean States when a convicted person has exhausted all legal procedures for judicial remedies, that person is entitled to petition to the United Nations Human Rights Committee and or the Inter-American Commission on Human Rights, to have their case reviewed. The applications to these bodies are to determine whether there was any derogation by the regional member States of any international standards or human right abuses.[881]

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[880] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[881] United Nations Secretariat, *Human Rights and Social Economic Development*, (United Nations Department of Public Information New York October Publication 1990) and Organization of American States General Secretariat, *American Convention on Human Rights* (Organization of American States San Jose Costa Rica 1969).

In order to activate the service of these human rights institutions, a petition must be filed by the aggrieved party. Usually, a petition will first be filed to the Inter-American Commission on Human Rights and in the event that the petition fails, a similar petition will be filed to the United Nations Human Rights Committee.[882]

There are provisions, which prevent the Inter-American Commission on Human Rights from hearing a petition which is pending or which has been examined and settled by another similar body of which the State concerned is a member. Therefore, in order to maximise one's benefit of these services, a petition will certainly be made first to the Inter-American Commission on Human Rights.[883]

The Privy Council in the *Pratt c*ase[884] recognised the importance of these two human rights bodies in relation to the death penalty. That recognition certainly embraces an acceptable period of delay for their deliberations but insisted that it should not be prolonged. The Privy Council demonstrates its acceptance of the role and functions of these bodies and as such it wished to say nothing to discourage Jamaica from benefiting from the wisdom of their deliberations.[885] It is for this reason that the Privy

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[882] United Nations Secretariat, *Human Rights and Social Economic Development*, (United Nations Department of Public Information New York October Publication 1990) and Organization of American States General Secretariat, *American Convention on Human Rights* (Organization of American States San Jose Costa Rica 1969).

[883] Ibid.

[884] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 361.

[885] *Ibid.*

Council allotted a total of eighteen months delay for matters to be dealt with before the international human rights bodies.[886]

This judicial allocation of a period of delay for international bodies which has been identified in the *Pratt* case has posed serious challenges to the regional governments. The reality is that these international bodies take longer than eighteen months to arrive at a decision. More importantly that statement is a demonstration of the legal model approach of the Privy Council on the issue. Of essence here is the fact that it judicially directed regional government to have a period of time to be allotted for delay on the part of international bodies.[887]

5.8.1: Analysing the impact of the Attitudinal Model on the Opinion of International Human Rights Organisations

Prior to the judgement in the *Lewis* case[888] the Privy Council held in the *Fisher* case[889] and also in the *Higgs* case[890] that it was not necessary to wait for the decision of the Inter-American Commission on Human Rights before the execution is carried out. However, the position in the *Lewis* case demonstrates the liberal attitudinal approach of the Privy Council where it has in effect overruled the decision in the *Fisher* case[891]

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[886] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 362 Lord Griffith suggested that ("It therefore appears to their Lordships that, provided that there is in future no acceptable delay in the domestic proceedings, complaints to the UNHRC from Jamaica should be infrequent and, when they occur, it should be possible for the committee to dispose of them with reasonable dispatch and (at most) within eighteen months.").

[887] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[888] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[889] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

[890] *Higgs v Minister of National Security* [2000] 2 WLR 1368, PC.

[891] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

and the *Higgs* case.[892] This is a further validation of the concept of judicial politics within the constitutionality of the death penalty.

It should be noted that in addressing the issue concerning the model pronounced in the *Pratt's* case,[893] the Governor-General of Jamaica issued procedural instructions on August 6, 1997 which purported to address the delay caused by the international bodies. Those instructions were featured in the challenge in the *Lewis* case[894] and it was stated in part by the Governor-General of Jamaica that applications to International Human Rights Bodies by or on behalf of Prisoners under sentence of death must be conducted in as expeditious a manner as possible.[895] A similar position was adopted by the Government of the Republic of Trinidad and Tobago and published in the Gazette on October 13, 1997 with regards to the international bodies.[896]

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[892] *Higgs v Minister of National Security* [2000] 2 WLR 1368, PC.

[893] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 362.

[894] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[895] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC it stated in part that ("Whereas the Government of Jamaica has resolved [that] those applications to International Human Rights Bodies by or on behalf of Prisoners under sentence of death must be conducted in as expeditious a manner as possible.").

[896] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC and the Gazette of the Republic of Trinidad and Tobago October 13, 1997 both indicate that: ("Where, after a period of six months, beginning on the date of despatch of such response, no recommendation has been received from the first International Human Rights body, the execution will not be further postponed unless intimation in writing is received by the Minister of National Security from or on behalf of the prisoner that he intends to make an application to the second International Human Rights body.").

The instructions in both instances include a period of six months for each of the international bodies to arrive at a decision. However, where there is a failure or there is non-communication on the part of these bodies the execution will not be postponed.[897] Naturally this directive seems to be in keeping with the legal model approach of the Privy Council which was illustrated in the *Fisher* case[898] and the *Higgs* case.[899]

The legality of those instructions were tested in the *Lewis* case.[900] In that case the Privy Council was asked to decide whether the prisoners have a right not to be executed before the Inter-American Commission on Human Rights or the United Nations Human Rights Committee has finally decided on their petitions. The Privy Council through its attitudinal model approach took a liberal position and proclaimed that the time limits imposed in the instructions violated the rules of natural justice and were therefore unlawful.[901]

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[897] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC and the Gazette of the Republic of Trinidad and Tobago October 13, 1997 both indicate that: ("Where, after a period of six months, beginning on the date of despatch of such response, no recommendation has been received from the first International Human Rights body, the execution will not be further postponed unless intimation in writing is received by the Minister of National Security from or on behalf of the prisoner that he intends to make an application to the second International Human Rights body.").

[898] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

[899] *Higgs v Minister of National Security* [2000] 2 WLR 1368, PC.

[900] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[901] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC held that: ("Accordingly their Lordships are of the view that the time limits imposed by the Governor-General in his instructions of 6th August 1997 violated the rules of natural justice and were unlawful. Execution consequent upon the Jamaican Privy Council's decision without consideration of the Inter-American Commission report would be unlawful.").

This decision by the Privy Council clearly suggests that it would be unlawful to carry out the execution without the opinion of the international bodies. Thus, the objective assessment of the issue under consideration would be that the opinions of these human rights bodies do matter on petitions for reprieve.

5.9: Summary of the Judicial Politics perspectives of the Privy Council

The legal and textual analysis pursued in this chapter resulted in six categories of cruelty determined by the Privy Council to wit delay in execution, swiftness of execution, mandatory death sentence, prison condition, ministerial advice prior to execution and opinion of international human rights organisations. It is quite obvious that the advancement of these six categories of cruelty are in reality the judicial condemnation of the death penalty in the Commonwealth Caribbean. This is clearly deduced from the judicial expressions made during the determination of the Commonwealth constitutional appeal matters on the death penalty which highlights the identifiable categories of cruelty.

Such expressions by the justices of the Privy Council are in reality the endorsement of the concept of judicial politics which is explored in this research. Therefore, a summary of such aspect of politics and the impacts they present on the death penalty in the Commonwealth Caribbean society are illustrated. It is worth noting that such expressions of judicial politics hinge primarily on the statements made by the liberal justices in their efforts to deviate from the conservative model approach of following precedent.

Delay of execution. In terms of delay of execution illustrated as a category of cruelty there are two identifiable impacts revealed in this category of cruelty. Firstly, there is the domestic impact whereby following the *Pratt's* case[902] Jamaica commuted 105 death sentences to life imprisonment whereas Trinidad and Tobago commuted 52 death sentences to life imprisonment.[903] The politics in this area was illustrated by Lord Griffith and accepted by Lords Lane, Ackner, Lowry, Slynn and Wolf. Here they proclaimed that if capital punishment is to be retained it must be carried out with all possible expedition and any delay will constitute inhuman or degrading punishment or other treatment and as such would be cruel.[904]

Secondly, there is the public policy impact emanated from the proclamation of the justices in the Privy Council in which it was considered that delay in excess of five years is inhuman or degrading treatment. This impact was illustrated in the said *Pratt* case[905] by Lord Griffith and is reflective as a directive to Jamaican government.[906]

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[902] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[903] Michael De La Bastide 'The Case for a Caribbean Court of Appeal' (1995) 5 Caribbean Law Review 401.

[904] *Pratt and Another v Attorney General for Jamaica and Another,* [1993] 43 WIR 340, PC 341 Lord Griffith held that: ("If capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated at an early stage. Although no attempt is made to set a rigid timetable, the entire domestic appeal process should be completed within approximately two years. If in any case execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment.").

[905] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[906] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 362 Lord Griffith directed that: ("In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". It therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC

Interestingly, Lord Griffith's perspective in the *Pratt's* case[907] was the complete opposite to Lord Diplock's perspective in the *De Freitas*[908] and *Abbott* cases[909] and to Lord Bridge perspective in the *Riley* case. In fact in the *Riley's* case Lord Bridge was adamant that whatever the reasons for (or the length of) any delay in the execution of a sentence of death lawfully imposed, the delay could afford no ground for holding the execution to be inhuman or degrading or other treatment.[910]

That being the case then the only objective conclusion that one could arrive at in relation to the statements made by Lord Griffith in the *Pratt* case as opposed to the statements made by Lord Bridge in the *Riley* case and also Lord Diplock in the *De Freitas* case is that the former statements (of Lord Griffith) were driven by politics. The point to note is that Lord Griffith judicially contrived the statements in the Privy Council that impacts ominously on the Commonwealth Caribbean Society.[911]

Swiftness of execution. In addressing swiftness of execution as a category of cruelty, the concept of judicial politics was very pronounced and it resulted in a twofold impact on the death penalty within the Commonwealth Caribbean society. Firstly, the justices

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who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment.").

[907] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[908] *De Freitas v Benny* [1975] 27 WIR 318, PC.

[909] *Abbott v Attorney General of Trinidad and Tobago and others* [1979] 1 WLR 1343, PC.

[910] *Riley and others v The Attorney General of Jamaica and Another* [1982] 35 WIR 279, PC.

[911] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

of the Privy Council established that swiftness of execution constitutes cruel and unusual punishment and secondly, they established a reasonable notice of time for execution rule as a requirement prior to any execution. The effectiveness of this rule means that notice must be given at least four days prior to execution which must include a weekend.

The *Guerra* case is quite relevant in the present instance. In that case the judgement was delivered by Lord Goff to which Lords Keith, Slynn, Nolan and Nicholls agreed. In the first instance those justices of the Privy Council exhibited judicial politics concept by saying that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution.[912] In addition, in the second instance the justices stated that a period of at least four clear days, including weekends will be necessary to constitute such reasonable time.[913]

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[912] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 596 [d], [e] it was stated that: ("Their Lordships are of the opinion that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice is required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal. Their Lordships understand that this principle was long recognised in England in the days when capital punishment was still in force; and for reasons which will shortly appear, the like principle appears to have long been accepted in Trinidad and Tobago. In these circumstances they are satisfied that to execute a condemned man without first giving him such notice of his execution would constitute cruel and unusual punishment contrary to section 5 (2) (b) of the Constitution.").

[913] *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 598 [b], [c] stated that: ("It follows that, in their Lordships' opinion, the due process of law requires that a reasonable time should be allowed to elapse between the reading of the warrant of execution and the execution itself, not only for humanitarian purposes which their Lordships have previously described, but also to provide a reasonable opportunity for the condemned man to take advice and if necessary seek relief from the courts. The settled practice that a period of at least four clear days (including weekends) will be necessary to constitute such reasonable time should be regarded as applicable as much to the latter purpose as to the former.").

An objective evaluation of both statements will clearly indicate that the justices of the Privy Council have abandoned their role as interpreters of the law and have taken on the role of legislators. This has brought into shape conflict the issue of the separation of powers, an issue though relevant does not form part of this research. It is obvious that both statements were judicially contrived by Lord Goff and justices in the Privy Council and it is a clear exhibition of the justices' liberal approach of personal ideology in the attitudinal model of judicial politics.[914]

Mandatory death sentence. The mandatory death sentence was defined through the concept of judicial politics in the Privy Council as a category of cruelty and this resulted in several impacts on the Commonwealth Caribbean society. In this regard the justices in the Privy Council acknowledged the inhumanity of the mandatory death penalty. Ancillary to this is that the death penalty should only be available where there is no possibility of reform and social reintegration of the offender. In addition, the imposition of the death penalty requires special justification and it should be reserved for the worst of the worst cases.[915]

The rulings of the Privy Council could be categorised in two areas: those rulings which are applicable for the Eastern Caribbean and Belize and those which are applicable for the wider Caribbean such as Trinidad and Tobago and Barbados. In the Eastern Caribbean and Belize, the trio of cases which collectively dealt with the issue were

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914 *Guerra v Baptiste and others* [1995] 4 All ER 583, PC 596 [d], [e]

915 *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC *and Reyes v The Queen* [2002] 2 AC 235, PC.

the *Hughes* case, *Fox* case and *Reyes* case. Lord Rodger delivered the judgement in those matters to which Lords Bingham, Hutton, Hobhouse and Millett agreed.[916] In delivering the judgement the justices of the Privy Council indicated that in a crime of this kind, there may well be matters relating both to the offence and the offender which ought to be considered before sentence is passed.[917]

This is a clear denunciation by Lord Rodgers in the Privy Council of the mandatory death penalty in the Eastern Caribbean countries and in Belize. *Hood* in a memoriam on Lord Rodger presented him in the context of one who recognised the need for continuing improvement and reform of the law.[918] Based on the principle of objectivity there is no indication that such a pronouncement in the *Hughes* case, *Fox* case and *Reyes* case was as a result of any legislative or constitutional interpretation but was the result of the justices' attitudinal ideology akin to judicial politics.[919]

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[916] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC *and Reyes v The Queen* [2002] 2 AC 235, PC.

[917] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC *and Reyes v The Queen* [2002] 2 AC 235, PC it was decided that: ("In a crime of this kind, there may well be matters relating both to the offence and the offender which ought to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny him his basic humanity.").

[918] Caroline M. Hood, *In Memoriam: Lord Rodger of Earlsferry (1944-2011)* (School of Law, University of Aberdeen 2011) presented: ("the belief that Lord Rodger did not place the law and particularly Scots law, on a pedestal but recognised the need for continuing improvement and reform.")..

[919] *Hughes v The Queen* [2002] 2 AC 284, PC; *Fox v The Queen* [2002] 2 AC 259, PC and *Reyes v The Queen* [2002] 2 AC 235, PC.

Whereas in the wider Caribbean the decisions in the *Roodal* case[920] and the *Matthew* case[921] are of practical importance. In the *Roodal* case Lord Bingham delivered the majority judgement to which Lords Steyn and Walker agreed and held that the mandatory death penalty in Trinidad and Tobago is unconstitutional. On the other hand Lords Millett and Rodger dissented [922]

However, in the *Matthew* case nine justices sat in the Privy Council to deal with this matter. They were Lord Hoffmann who delivered the majority judgement to which Lords Hope, Scott, Rodger and Zacca agreed. The justices overruled the previous decision in the *Roodal* case and held that the mandatory death penalty in Trinidad and Tobago is constitutional and could only be abolished through an Act of Parliament.[923] In this said case Lord Bingham and Lord Nicholls each wrote a dissenting judgement while Lords Steyn and Walker subscribed to the dissenting judgements.

What is interesting in the *Matthew* case is the fact that the justices in the Privy Council corrected the previous decision in the *Roodal* case. In fact the *Roodal* judgement did not seriously consider section 6 (1) and 6 (3) of the Constitution whose provisions contain the saving clause that saved the death penalty law as an existing punishment

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[920] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[921] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[922] *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652, PC.

[923] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

for persons guilty of murder in Trinidad and Tobago.[924] This therefore means that based on the principle of objectivity the *Roodal* judgement was clearly driven by judicial politics.[925]

Prison conditions. The *Lewis* case is applicable with regard to this and the next two categories of cruelty and it clearly demonstrates the concept of judicial politics by the justices of the Privy Council. In terms of *prison conditions* the overall impact of judicial politics in the Privy Council is that that prison conditions could amount to inhuman and degrading treatment.[926]

Ministerial advice prior to execution. The impact of this category of cruelty illustrates that the merits of the petition for reprieve are not for the court to review but where there is the failure of the observance of the rules of natural justice of fair play in action same would be cruel.

Opinions of International Human Rights Bodies on the petition of reprieve. The overall impact of this category of cruelty is a recognition of international bodies. It is worth noting that the Privy Council in the *Pratt* case urged that the decision of international tribunals be afforded weight and respect. In the *Lewis* case, Lord Slynn

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[924]Constitution of the Republic of Trinidad and Tobago, s. 6 (1) (3) and Margaret A. Burham, 'Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean' (2004) 36 (2 & 3) Inter-American Law Review 249 -269 at 250.

[925] Ibid.

[926] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

showed appreciation for all three categories of cruelty which is a clear departure from the legal model approach which in each instance spoke to the contrary. However, of importance here is the fact that Lord Hoffman denounced the attitudinal model approach of the Privy Council in a dissenting judgment in *Lewis et al v. Attorney General of Jamaica and another.*[927]

That statement by Lord Hoffman, though a dissenting one, is also denunciation of the judicial politics perspective of the justices in the Privy Council towards the constitutionality of the death penalty in the Commonwealth Caribbean. This concept of judicial politics seems to be a dominant perspective for the judiciary to address public and social policies in recent times.[928]

In summary the motivation of justices in their decisions on policy are not only reflected in their judicial preferences but could be deduced from areas outside the courts such as the judge's political ideology. This would suggest that a justice of the Privy Council exhibits both judicial and political decision-making role. *Garoupa* in a study on judicial decision making subscribed to this notion by indicating that there are some specific aspects of the legal environment that account for the diversion in

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[927] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC Lord Hoffman said: ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

[928] Diana Woodhouse, *The Law and Politics More Powers to Judges – and to the People?* 54 (Hansard Society for Parliamentary Government 2001) 223 – 237 at 234 eloquently indicated that: ("Judges will not only be scrutinising decisions made by those in public office but will also be giving effect to states in a way which is compatible with Convention rights 'in so far as it is possible to do so'. This means that they will where necessary read words into statutes to ensure compatibility, even if this alters the substance of what Parliament intended. Moreover, through making a 'declaration of incompatibility' judges will in effect be initiating legislation, a role technically confined to politicians.").

decisions.[929] By comparison, in a similar study conducted in another jurisdiction, *Ostberg and Wetstein* concluded that Canadian Supreme Court justices are indeed influenced by their own attitudes and values when approaching salient controversial discrimination claims.[930]

5.10: Conclusion

Goldberg and Dershowitz in their research on the death penalty surmised that from the analysis of cruel and unusual punishment doctrine it is obvious that there are a set of principles which condemn the death penalty as being unconstitutional.[931] In similar fashion the data presented in this chapter demonstrate that the role of the Privy Council and its justices in decision-making on the death penalty for the Commonwealth Caribbean is certainly not a simple one (see table 5.1).

In October 2011 the British Foreign and Commonwealth Office produced a journal on *'HMG Strategy for Abolition of the Death Penalty 2010-2015'* which sets out the

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[929] Nuno Garoupa, *Constitutional Review* (Texas A&M University School of Law 2016) 1- 26 at 3 stated that: ("Realistically judicial decision-making in a constitutional court, as in any court, reflects a complex set of different determinants, including personal attributes, attitudes (policy or ideological preferences being relevant), peer pressure, intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court), and party politics (loyalty to the appointer) within a given constitutional and doctrinal environment.").

[930] C. L. Ostberg and Matthew E. Wetstein, Equality Cases and the Attitudinal Model in the Supreme Court of Canada (University of the Pacific and the Canadian Political Science Association, Winnipeg, Manitoba, June 5, 2004) 1 – 33 at 20.

[931] Arthur J. Goldberg and Alan M. Dershowitz, 'Declaring the Death Penalty Unconstitutional' (1970).83 Harvard Law Review 1773 – 1819 at 1797 – 1798 surmised that: ("The conclusion to be drawn from this analysis of cruel and unusual punishment doctrine is that the clause has generated a set of principles which, when coupled systematically with traditional modes of adjudication applied to the protection of other primary rights, condemn the death penalty as unconstitutional. These principles are both implicit in precedent and immediately compelling.").

United Kingdom's policy on the death penalty, and offers guidance to Foreign Commonwealth Office overseas missions on how they can take its objectives foward. One of its overarching goals which was also illustrated in that journal was the reduction in the numbers of executions and further restrictions on the use of the death penalty in retentionist countries.[932]

In this present research the analysis of the data collected seems to suggest that the Privy Council has been fulfilling this overarching goal. In fact the said British Foreign and Commonwealth Office journal indicated quite interestingly that the United Kingdom has had successes over the restricting of the use of the death penalty in the Commonwealth Caribbean.[933]

It seems clear that the Privy Council has satisfactorily fulfilled the overarching goal of the United Kingdom Foreign and Commonwealth Office by adopting models or patterns of behaviour which are the basic procedures for arriving at judicial decisions on the death penalty. It was suggested by *Dahl* that the Court operates to confer legitimacy upon the basic patterns of behaviour required for the operation of a democracy.[934]

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[932] British Secretary for Foreign and Commonwealth Office, 'HMG Strategy for Abolition of the Death Penalty 2010-2015' (Foreign and Commonwealth Office 2011) 1 -23 at 5.

[933] British Secretary for Foreign and Commonwealth Office, 'HMG Strategy for Abolition of the Death Penalty 2010-2015' (Foreign and Commonwealth Office 2011) 1 -23 at 10.

[934] Robert A. Dahl, 'Decision-making in a Democracy: The Supreme Court as a National Policy-maker' (1957) Journal of Public Law 279-295 suggested that: ("The existence of these patterns of behaviour in turn presupposes widespread agreement (particularly among the politically active and influential segments of the population) on the validity and propriety of behaviour. Although its record is by no means lacking in serious blemishes, at its best the Court operates to confer legitimacy, not simply on

The point to note here is that these patterns of judicial behaviour demonstrate the extent to which the Privy Council has gone outside the established legal criteria of precedent, statute and Constitution or other legal model approaches in decision making on issues addressing the death penalty. In this regard *Mitchell* said in a commentary on the death penalty that: *"Perhaps the most troubling aspect of the Supreme Court's regulation of capital punishment has been its failure to persuasively explain why the Court's judgments surrounding the use of capital punishment should prevail over the decisions made by the political branches."*[935]

Moreover, the action of the Privy Council is also a demonstration of the magnitude of the relation of the influence of judicial politics in the decision making on the death penalty at the level of the said Privy Council. However, *Tennen* put it quite succinctly when he said that the Supreme Court has the power to affect the death penalty.[*936*]

It is worth noting that *Antoine* reflected on the Privy Council decisions on the constitutionality of the death penalty in the Commonwealth Caribbean and said that the judgments were hugely unpopular in the region, by governments and peoples alike who, by and large, supported the death penalty. Moreover, they believe that the Privy

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the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behaviour required for the operation of a democracy.").

[935] Jonathan F. Mitchell, 'Death Penalty Commentary Series Capital Punishment and the Courts' (2017) 130 Harvard Law Review Forum 269 -275 at 274.

[936] Eric Tennen, 'The Supreme Court's Influence on the Death Penalty in America: A Hollow Hope?' (2005) Public Interest Law Journal 251 – 275 at 257 said: ("These statistics contradict the view that certain Supreme Court decisions have been a catalyst for curtailing the death penalty. As noted, the Supreme Court has the power to affect the death penalty. Given that, many people seem to believe that the Court has been using this power… to severely limit the scope of the death penalty.").

Council displayed a serious disregard for the intent and spirit of the constitutions in question and the will of the Caribbean peoples.[937] The objective assessment of this statement is a recognition and validation of the presence of judicial politics at the level of the Privy Council similar to recognition made by the then Prime Minister Manning in the 2007 statement on the consultation on crime in Trinidad and Tobago.[938]

In similar vein the International Commission against the Death Penalty in an article on the death penalty and the most serious crimes, validated the strategic role of the Privy Council in death penalty matters.[939] In a review of its work on the death penalty situation in the Commonwealth Caribbean it clearly articulated and glorified the ideology of the Privy Council as demonstrated in its research.[940]

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[937] Rose-Marie B. Antoine, 'Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems' (2005) 29 (2) Nova Law Review 140 – 169 at 152 – 153 indicated that: ("These judgments were hugely unpopular in the region, by governments and peoples alike who, by and large, supported the death penalty. Many believed that the Privy Council was attempting to force its own belief that the death penalty should be outlawed (which is the position in the United Kingdom) onto Commonwealth Caribbean legal systems. Notwithstanding cries of judicial imperialism made by the general public, it is clear from precedents from the European Court of Human Rights and the United Nations Human Rights Committee that the position on undue delay was one grounded in international law. Yet, the judgments displayed a serious disregard for the intent and spirit of the constitutions in question and the will of the Caribbean peoples.").

[938] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79.

[939] Secretariat of the International Commission Against the Death Penalty, 'The Death penalty and the most serious crimes' (2013) International Commission against the Death Penalty Review 1 – 39.

[940] Secretariat of the International Commission against the Death Penalty, 'The Death Penalty and the most serious crimes' (2013) International Commission Against the Death Penalty Review 12 illustrates: ("The continuing limitations and rare use of the death penalty were attributable in part to rulings by a number of judicial and quasi-judicial bodies including the Caribbean Court of Justice and the Eastern Caribbean Supreme Court, the UN Human Rights Committee, the Inter-American human rights system and the Judicial Committee of the Privy Council based in London (traditional court of appeal for Commonwealth nations). Between them these bodies have engaged in strategic litigation which has resulted in prohibition of the mandatory death penalty, limits on the number of years prisoners can spend on death row, and the restriction of capital crimes to exceptionally heinous murders ("worst of the worst").

Thus, the strategic litigations have defined the constitutionality of the death penalty in the Commonwealth Caribbean. This resulted in the judicial prohibition and restriction of the death penalty and as such described in clear terms the present research analytic model of judicial politics.[941] *Peel* in her writing echoes the theory that waiting to die inevitably causes suffering, but a delay between sentence and execution is an obvious necessity for the appeals process.[942]

This research clearly endorsed the attitudinal ideological approach of the Privy Council from this research perspective. In the words of *Amaral-Garcia and Garoupa's* research on the judicial politics at the Privy Council, they indicated that the so-called attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model of judicial decision making.[943] Therefore, this research

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[941] Secretariat of the International Commission against the Death Penalty, 'The Death Penalty and the most serious crimes' (2013) International Commission Against the Death Penalty Review 12.

[942] Diana Peel, 'Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration' (2013) 14(3), Western Criminology Review 61-72 at 66 stated that: ("Waiting to die inevitably causes suffering, but a delay between sentence and execution is necessary for the appeals process. Internationally, courts have deemed that it only becomes cruel when the delay is no longer attributable to a legitimate purpose, because the appeals process is not being carried out in a timely manner. This is not to say that appeals should be expedited, as that could result in a less thorough judicial review, and render the safeguard of the appeals process meaningless. Rather, if a state wishes to maintain capital punishment, it must have a fully functioning and efficient capital appeals process that is capable of carrying out thorough judicial reviews of all of those that the state sentences to death in a timely fashion. If the system cannot do that, then the fault is with the system, and it is not just to subject men and women to years on death row because the system does not work.").

[943] Sofia Amaral-Garcia, and Nuno Garoupa, *Judicial Politics at the Privy Council: Empirical Evidence* (ETH Zurich, Center for Law and Economics 2014) 1 – 47 at 7 said: ("There is vast literature on judicial politics. Different theories have been developed, mainly in the context of the United States, to explain judicial behavior. In this respect, there is an important ongoing debate over whether judges are guided solely by the law, solely by their personal ideology, or by a mixture of the two. Formalists or legalists argue that judges simply interpret and apply the law in a largely conformist view of precedents. In other words, judges are fundamentally guided by what the law says and abide by a strict legal authoritative interpretation. The so-called attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model.").

illustrates the impact of this model arising from the post-conviction process, which generate delay in execution, swiftness of execution, mandatory/discretionary death sentence, prison conditions, ministerial advice prior to execution and opinions of international human rights bodies on the petition of reprieve which were formally characterized by uncertainty have now been deemed cruel, unlawful and unconstitutional.

CHAPTER SIX

ANALYSIS OF THE HUMAN RIGHTS ISSUES THAT IMPACT ON THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN

This chapter presents a discussion on human rights issues which complement the legal analysis presented in the previous chapter. Both analysis have comingled to present the impact of the application of the death penalty in the Commonwealth Caribbean. *Hammond,* Chief Executive of the Equality and Human Rights Commission, indicated that human rights are the basic rights and freedoms that belong to everyone.[944] It entails the rights that are inherent to all human beings. *Donnelly* in his writing on protecting dignity added that human rights are, according to the literal sense of the term, the rights that we have simply because we are human.[945]

Thus what are considered human rights are expressed in some major international treaties. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its optional protocols, the Convention on the Rights of the Child and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment.

These instruments are known collectively as the International Bill of Human Rights. They address a broad array of human rights, including those relevant to the death

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[944] Mark Hammond, *Human Rights: Human Lives* (Equality and Human Rights Commission 2014) 1 – 81 at 5.

[945] Jack Donnelly, *Protecting Dignity: Agenda for Human Rights Human Dignity And Human Rights* (Geneva Academy of International Humanitarian Law and Human Rights, 2009) 1 – 92 at 8.

penalty. It should be noted that all people are guaranteed protections from discrimination, torture, and cruel or unusual punishment, as well as the right to life, security of person, due process and equality before the courts. *Johnson*, writing on the subject the reflections on the death penalty, indicated that a central premise of human rights thinking is that each and every human being has an innate dignity that must be respected. Moreover, respect for one's human dignity is the original human right from which other human rights flow.[946] In this regard a reflection will be made on those aspects of human rights that are appropriate only to the death penalty in the Commonwealth Caribbean.

6.1: Impact of the International Human Rights norms towards the Death Penalty in the Commonwealth Caribbean

Universal Declaration of Human Rights. In an article on human rights examination, case study and jurisprudence, *Goel* said that the deliberate institutionalized taking of human life by the State is the greatest degradation of the human personality imaginable.[947] This assertion is an issue of human rights which has brought into sharp focus a statement made by *Hanna Jr.,* Director of the Legal Aid Clinic, Eugene Dupuch Law School, The Bahamas in which he said that the death penalty really is a dangerous weapon in the hands of the legal system.[948]

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[946] Robert Johnson, 'Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House' (2014) 13 (2) Seattle Journal For Social Justice, 583 – 598 at 583 - 584.

[947] Vaibhav Goel, 'Capital punishment: A human right examination case study and jurisprudence' 3 (9), 2008 *International NGO Journal,* 152-161 at 152.

[948] Amnesty International Secretariat, 'Death Penalty in the English-Speaking Caribbean A Human Rights Issue' (Amnesty International publications 2012) 15 it was said: ("It's very easy to convict someone under our legal system who may be innocent, and there is no redress, unless you have public

This statement was clearly evident in a reflection of the facts in *Pratt* case.[949] In that case it was quite noticeable that Lord Griffith in the Privy Council was concerned about the issue of human rights in the application of the death penalty.[950]

The reality of this suggestion is the consideration that the application of the death penalty in the Commonwealth Caribbean is a violation of the most basic of human rights since the states in the region must recognise the right to life.[951] In similar vein Justice Chaskalson in the South African Constitutional Court in the case *Makwanyane and Mchunu*,[952] said: *"The rights to life and dignity are the most important of all human rights . . . . And this must be demonstrated by the State in everything that it does, including the way it punishes criminals."*[953]

The death penalty is a denial of the most basic human rights which violates one of the most fundamental principles under widely accepted human rights law and that states

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campaigns to overturn a decision, and we don't have that kind of culture in the Bahamas, so given the absence of that sort of activism in our community, the death penalty really is a dangerous weapon in the hands of the legal system.").

[949] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

[950] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC. 343 it was stated that: ("The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the fourteen years they have been in prison facing the gallows.... It is against this disturbing background that their lordships must now determine this constitutional appeal and must in particular re-examine the correctness of the majority decision in *Riley and Others v Attorney-General of Jamaica and Another* (1982). 35 WIR. 279.").

[951] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 7.

[952] *Makwanyane and Mchunu v. The State,* 16 HRLJ 154 (Const. Ct. of S. Africa 1995).

[953] *Ibid.*

must recognize the right to life. It is in this regard, the Universal Declaration of Human Rights which was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 through the General Assembly resolution 217A. That Declaration presents a common standard of achievements for all peoples and all nations.

With regard to the application of the death penalty two of the articles of the Declaration are significant where human rights are concern. In principle article 3 of the said Declaration stated that "*Everyone has the right to life, liberty and security of person."* This article suggest that the use of the death penalty in Commonwealth Caribbean violates the region's obligations under international human rights law and this was evident in the *Pratt's* decision.[954]

Moreover, article 3 is complimented with article 5 of the said Declaration which prevent and prohibit discrimination and torture, cruel, inhuman or degrading treatment. This later article specifically states that *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."* In this regard, *Prokosch* writing on the subject of human rights illustrated its significance by saying that the cruelty of the death penalty is manifest not only in the execution but in the time spent under sentence of death.[955]

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[954] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 343.

[955] Eric Prokosch, 'Human Rights V. The Death Penalty Abolition and Restriction in Law and Practice' (1998) Amnesty International 1 – 14 at 2 illustrated that ("The cruelty of the death penalty is manifest not only in the execution but in the time spent under sentence of death, during which the prisoner is constantly contemplating his or her own death at the hands of the state. This cruelty cannot be justified, no matter how cruel the crime of which the prisoner has been convicted.").

The Privy Council has recognised this aspect of cruelty in terms of prison conditions. For instance, it ruled in this regard in the *Pratt's* case that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.[956] This statement most definitely demonstrates the Privy Council concern as it relates to inhuman or degrading punishment or treatment and subtly placing a ban on the death penalty.

International Covenant on Civil and Political Rights. It should be further noted that the International Covenant on Civil and Political Rights is one of the key documents discussing the imposition of the death penalty in international human rights law. This covenant was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200 A (XXI) of 16 December, 1966. Subsequently it came into force on March 23, 1976.[957]

Accordingly article 6 of the said Covenant contains restrictions to the death penalty since it illustrates guarantees regarding the right to life, and also contains important safeguards to be followed by signatories who retain the death penalty. It is proclaimed in article 6 (1) of the said Covenant that "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his*

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[956] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 341.

[957] United Nations, 'International Covenant on Civil and Political Rights' (ICCPR) in 1976 (Adopted and opened for signature, ratification and accession) by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49).

life." In addition, article 6 (2) of the said Covenant states that: *"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."*

Moreover, article 6 (4) of the Covenant requires countries to ensure that *"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."* Whereas article 6 (5) of the said Covenant provided for restriction and states that a *"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."* Additionally, article 6 (6) of the said Covenant provides that "*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."*

The *Lewis et al* case is interesting in this regard since it dealt specifically with human rights issues in three areas namely prison conditions, ministerial advice prior to execution and appeal to International Human Rights Bodies on the petition for reprieve. [958] The Privy Council in that case gave recognition to Article 6 of *International Covenant on Civil and Political Rights*. By so doing it restricted the

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[958] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

death penalty on human rights ground and thereby created issues of cruelty. With such a creation it resulted in the Privy Council overruling its previous decision in cases of *Thomas and Another v Baptiste,*[959] *Reckley v Minister of Public Safety and Immigration and others,*[960] *and Fisher v Minister of Public Safety and Immigration*[961] of which there were no previous issues of cruelty.

Moreover, the Privy Council decision in the *Lewis et al* case[962] naturally subscribed to the thinking of the Inter-American Commission on Human Rights. In its report on the conditions of person on death row it stated that States have the obligation, as guarantors of the rights of people under their custody, to provide adequate prison conditions, as interpreted in light of minimum international standards in this area.[963]

Further, the Inter-American Court of Human Rights illustrated similar restrictions to the death penalty by indicating that the Convention adopts an approach that is clearly incremental in character. That is, the Convention imposes restrictions designed to

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[959] *Thomas and Another v Baptiste* [1998] 54 WIR 387, PC.

[960] *Reckley v Minister of Public Safety and Immigration and others* (No. 2) [1996] 1 All ER 562, PC.

[961] *Fisher v Minister of Public Safety and Immigration* (No. 2) [2000] 1 AC 434, PC.

[962] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[963] Inter-American Commission on Human Rights, *The Death Penalty In The Inter-American Human Rights System: From Restrictions To Abolition,* (Organization of American States 2011) 1 – 201 at 176 indicated that: ("States have the obligation, as guarantors of the rights of people under their custody, to provide adequate prison conditions, as interpreted in light of minimum international standards in this area. All detained persons have the right to live in conditions compatible with the inherent dignity of every human being. This entails a duty upon States to ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention, and that the detainees' health and welfare are adequately safeguarded. A failure to do so may result in a violation of the absolute prohibition of cruel, inhuman or degrading punishment or treatment.").

delimit strictly the application of the penalty to bring about its gradual disappearance.[964]

The United Nations Human Rights Committee, the United Nations body whose interpretations of the International Covenant on Civil and Political Rights are considered authoritative, discussed article 6 of the International Covenant on Civil and Political Rights in detail in its General Comment in 1982. The Committee clarified that while the International Covenant on Civil and Political Rights did not explicitly require the abolition of the death penalty, abolition was desirable, and as such the Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.[965]

The Committee also said that the death penalty should be an exceptional measure. It reiterated important procedural safeguards including that the death penalty can only be imposed in accordance with the law in force at the time of the commission of the crime, and that the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defence, and the right to review by a higher tribunal must all be strictly observed. As at September 2019, the International

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[964] Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) And 4(4) American Convention On Human Rights) Advisory Opinion OC-3/83 of September 8, 1983, para. 57.

[965] High Commissioner for Human Rights, 'CCPR General Comment No. 6: Article 6 Right to Life' *(Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982)* (Office of the High Commissioner for Human Rights) 1- 2.

Covenant on Civil and Political Rights has 173 state parties and a further six countries have been signatories but have not yet ratified the Covenant.[966]

The Second Optional Protocol to the International Covenant on Civil and Political Rights. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and as October 2019 there has been 88 states parties and 39 signatories.[967]

In this regard it is stated in the preamble to the protocol that the abolition of the death penalty contributes to enhancement of human dignity and the progressive development of human rights.[968] Article 1(1) of the Second Optional Protocol states that *"No one within the jurisdiction of a State Party to the present Protocol shall be executed."* and whereas article 1(2) of the said Protocol was instructive when it said that *"Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."*

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[966] High Commissioner for Human Rights, 'CCPR General Comment No. 6: Article 6 Right to Life' *(Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982)* (Office of the High Commissioner for Human Rights) 1- 2.

[967] United Nations General Assembly, 'Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty' (*Adopted and proclaimed by* at the Forty-fourth session of the *General Assembly resolution 44/128 of 15 December 1989)* 1 – 2.

[968]United Nations General Assembly, 'Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty' (*Adopted and proclaimed by* at the Forty-fourth session of the *General Assembly resolution 44/128 of 15 December 1989)* 1 – 2 indicated that: ("The States Parties to the present Protocol, Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.").

In addition, article 2 of the said Second Optional Protocol declares that: *"No reservation is admissible to the Second Optional Protocol except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."* Some state parties have made such reservations. In this regards *Schmidt* in his writing on the universality of human rights and the death penalty said that in spite of the fact that the death penalty is permissible under the Covenant, the Human Rights Committee has used both the reporting and the Optional Protocol procedure to limit states parties' resort to its application.[969]

The Convention on the Rights of the Child. Similar to the International Covenant on Civil and Political Rights, article 37(a) of the Convention on the Rights of the Child explicitly prohibits the use of the death penalty against persons under the age of eighteen years. Accordingly, article 37(a) of the said Convention indicates that States Parties shall ensure that: (a) *"No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."* As of July 2015, 196 countries had ratified the Convention on the Rights of the Child.

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[969] Markus G. Schmidt, 'Universality Of Human Rights And The Death Penalty-The Approach Of The Human Rights Committee' (1977) (3) ILSA Journal of Int'l & Comparative Law, 477 – 489 at 489.

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. Evolving from the analysis in this research there is the indication that the death penalty violates the principle against torture and cruel, inhuman, and degrading treatment or punishment. In this context, the Special Rapporteur on Torture evaluated the use of the death penalty and the conditions under which it is implemented and found that regardless of the legality of the death penalty itself, its use amounts to torture.[970]

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment also known as the Torture Convention and the United Nations Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment.[971]

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[970] Juan E. Méndez, **'**Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (United Nations General Assembly resolution 66/150, 2012) 20 said: ("even if the emergence of a customary norm that considers the death penalty as per se running afoul of the prohibition of torture and cruel, inhuman or degrading treatment is still under way, most conditions under which capital punishment is actually applied renders the punishment tantamount to torture. Under many other, less severe conditions, it still amounts to cruel, inhuman or degrading treatment.").

[971] United Nation Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (United Nation Resolution 39/46 December 10, 1984, 145 UN.T.S. 85 [entered into force June 26, 1987] Article 1 of the said Convention describes the term torture to mean ("any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

The fact that the death penalty is a lawful sanction it clearly does not reflect torture under the Convention. However, some methods of execution and the phenomenon of death row have been seen as forms of torture under the Convention on the Rights of the Child by United Nations.

In the Commonwealth Caribbean Human Rights Seminar held during the period September 12 to 14, 2000 at the Radisson Fort George Hotel, Belize City, *Lehrfreund* speaking on international law and domestic court urged Caribbean courts to have regards to international norms when determining issues concerning the application of capital punishment.[972] Further, *Lehrfreund* in his presentation made reference to national courts including the Courts in the United Kingdom which avail themselves to the use of international law in addressing domestic issues.[973]

This statement is quite interesting since, although the Privy Council sits in London and is to a significant degree composed of English judges, it is not a United Kingdom national court. When deciding a case, it applies the law of the jurisdiction from which

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[972] Saul Lehrreund, 'The Commonwealth Caribbean and evolving international attitudes towards the death penalty' (Foreign and Commonwealth Office, 2000) 75 – 90 at 76 urged Caribbean courts: ("In the exercise of its constitutional jurisdiction the domestic courts in the Caribbean, when determining issues concerning the application of capital punishment, should have regard to international norms as illustrative of contemporary standards of justice and humanity.").

[973] Saul Lehrreund, 'The Commonwealth Caribbean and evolving international attitudes towards the death penalty' (Foreign and Commonwealth Office, 2000) 75 – 90 at 77 emphasised that: ("National courts of several states including South Africa, Zimbabwe, Canada, and the United Kingdom, have found international law to be particularly helpful in the interpretation of such notions as the right to life and the protection against cruel, inhuman and degrading punishment.").

the case comes such as Trinidad and Tobago, Jersey and the Cayman Islands or wherever.

Moreover, the treatment of prisoners under sentence of death is at the fore front of international law. *Hearn* in an article on the said issue clearly demonstrated the attitude of the Privy Council in this area by indicating that the death row phenomenon as out of step with modern international human rights standards.[974]

It should be noted that in this regard the United Nations Economic and Social Council on 23 July 1996 adopted Resolution 1996/15 which is applicable to that effect and which: *"Urges Member States in which the death penalty may be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering."*[975]

In this vein it seems plausible that the Privy Council had given consideration to the wordings of international law and in particularly Resolution 1996/15 in the decision in the *Pratt* case.[976] In that decision the following is testimony to their thinking on the

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[974] Jane Hearn, New Legal Breakthrough for Death Row Prisoners: Pratt v Attorney General for Jamaica (1994) 1(1) Australian Journal of Human Rights 392 – 397 at 393 indicated: ("The Privy Council has effectively condemned the 'death row' phenomenon as out of step with modern international human rights standards and the case is expected to lead to renewed constitutional challenges to the death penalty in the USA. The case is also significant for its reliance on the decisions of international human rights bodies and the influence of international legal materials on the development of common law and constitutional interpretation.").

[975] United Nations Economic and Social Council (adopted) Resolution 1996/15 on 23 July 1996, P7.

[976] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC.

treatment of prisoners when they said that the primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them.[977] Moreover, in the 2015 annual report of the United Nations High Commissioner for Human Rights it was published by the High Commissioner and the Secretary-General, that the death penalty has no place in the twenty-first century and it is incompatible with fundamental tenets of human rights, in particular human dignity.[978] This point was also being emphasized by *Olalere* in her study on the dilemma of death penalty when she said that with the awareness of human right, death penalty should not be a policy implemented in the twenty-first century.[979]

6.2: Conclusion

Thus it is credible to conclude that international legal norms have evolved to restrict the lawful use of the death penalty in a very narrow variety of cases, and a very limited manner.[980] In 1984, the United Nations adopted the Safeguards Guaranteeing

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[977] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC, 355 said: ("The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before Independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection.").

[978] United Nations Secretary-General, 'Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (*Office of the High Commissioner and the Secretary-General 2015)* 1 – 18 at 18 said: ("the death penalty has no place in the twenty-first century. In the light of the evolution of international human rights law and jurisprudence and State practice, the imposition of the death penalty is incompatible with fundamental tenets of human rights, in particular human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. The application of the death penalty often also violates the right to equality and the principle of non-discrimination.").

[979] Shona Olalere, 'The Dilemma of Death Penalty' (University of the West of Scotland 2018) 1 – 9 at 6.

[980] Saul Lehrreund, 'The Commonwealth Caribbean and evolving international attitudes towards the death penalty' (Foreign and Commonwealth Office, 2000) 75 – 90 at 77 said: ("the dynamic approach afforded to the interpretation of international instruments, the resolution of constitutional issues by the

Protection of the Rights of Those Facing the Death Penalty, which limit the use of the death penalty and protect those facing it from extensive suffering. Later the United Nations reinforced its stance that the death penalty is incompatible with human rights when it adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Countries that ratify the optional protocol must end all executions and take steps to abolish the death penalty.[981]

There is a clear trend towards abolition of the death penalty in international law and state practice in the region and across the globe. As recent as 2007 there was resolution adopted by the United Nations General Assembly which called for the abolition of the death penalty worldwide.[982] Perhaps it worth ending this chapter with the thinking of the permanent Deacons of Paterson, New Jersey on this subject. They indicated said that a truly human and responsible society cannot abdicate its moral responsibilities as it is related to the protection and enhancement of human life. The point of significance here is that life is both sacred and social and as such society must protect and foster it at all stages and in all circumstances through the institutions of

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domestic courts, concerning the application of the death penalty, is severely hampered by limitations to the existence and enjoyment of human rights.").

[981] Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights.

[982] United Nations General Assembly, Resolution 2/149 (adopted by the United Nations General Assembly on 18 December 2007) specifically states that: ("Considering that the use of the death penalty undermines human dignity, and convinced that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights, that there is no conclusive evidence of the death penalty's deterrent value and that any miscarriage or failure of justice in the death penalty's implementation is irreversible and irreparable.").

the state. Quite naturally this accounts for the position taken by the Privy Council in the constitutional appeal on the death penalty.[983]

[983] Mary E. Williams, *Capital Punishment*, 'Capital Punishment Undermines the Sacredness of Life' (Greenhaven Press, Inc. San Diego) 50 – 57 at 50.

CHAPTER SEVEN

RESEARCH RESULTS AND CONCLUSIONS

This chapter is integral to the research for two reasons. Firstly, there is the presentation of the research results in the subject of *Judicial Politics in the Privy Council and its impact on the Constitutionality of the Death Penalty in the Commonwealth Caribbean.* Secondly, there is the presentation of main conclusions to the research. In terms of the presentation of the research results *Babbie* suggested that the listing of the attributes which were investigated and then reporting on the findings is the basic form of presenting the results in this research.[984] In this regard the research findings in the thesis would encapsulate an analytical summary of the information unearthed during the research exploration. Therefore, this would involve the presentation of the findings through the process of analysing and objectively explaining the relevant individual attribute.

On the other hand subsequent to presenting the results there are four main conclusions derived from this research. Firstly, there is a conclusive answer to the research question. Secondly, there is presentation of an overall conclusion based on a criminal justice understanding and explanation to the research problem. Thirdly, the implications of this research for the Commonwealth Caribbean society have been presented. Finally, recommendations are provided herein to treat specifically with the future of the death penalty.

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[984] Earl Babbie, *The Practice of Social Science Research* (6th edn. Wadworth Publishing Company Belmont California 1992) 389.

7.1: The Impact of Judicial Politics on the Legal Doctrine of the Constitutionality of Death Penalty

Legislate strategically. In 1976 *Delvin* indicated that there is no doubt that historically judges did make law, at least in the sense of formulating it.[985] By analogy the key impact of judicial politics on the legal doctrine of the constitutionality of death penalty which is revealed in this research is that the Privy Council, through its decision making, occasionally legislates strategically. On the other hand *Presser* said that perhaps it would be, after all, more than a bit naïve to argue that judges do not make laws.[986]

One major attribute which is revealed from an evaluation of the data which is tabulated in table 5.1 is that the Privy Council, as an institution through the legal doctrine of judicial politics, occasionally legislates strategically. Thus the attitudinal approach illustrated the six categories of cruelty which are presented in table 5.1 and which are in reality new laws made by the Privy Council. As *Dworkin* said in an article on hard cases that judges must sometimes make new laws, either covertly or explicitly.[987]

Thus the inescapable implication of the Privy Council being a legislator is the fact that there is a potential for the loss of liberty because the change alters what the law permits and risks favouring some persons over others. This scenario was evident for instance,

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985 Patrick Delvin, Judges and Lawmakers (1976) 39 (1) The Modern Law Review 1 – 16 at 5.

986 Stephen B. Presser, 'Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary' (2008) Loyola University Chicago Law Journal 47 – 468 at 467.

987 Ronald Dworkin, 'Hard Cases' (1975) 88 (6) Harvard Law Review, 1057 – 1109 at 1058.

in the *Boodram* case.[988] In that case the appellants complained in 1999 that their appeals against conviction and their petitions to the human rights organisations had been facilitated and determined without them being subjected to the delays which had been experienced by other persons convicted of murder.

The Privy Council held that the appeal had no substance since there was no breach of the appellants' constitutional rights and the appellants were eventually executed in June 1999. However, four years later following the judgement in the *Matthew* case[989] and based on the principle in the *Roodal* case[990] fifty prisoners on death sentence in the Republic of Trinidad and Tobago had their sentence commuted to life imprisonment. Had the appellants in the *Boodram* case[991] been successful in their appeal to the Privy Council then they would have benefitted from the judgement in the *Matthew* case[992] which benefitted the fifty prisoners under death sentence in the Republic of Trinidad and Tobago. In this regard *Pound* in his research on the theory of judicial decision indicates that judicial declaration of law prescribes a rule with reference to precedent.[993]

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[988] *Boodram and Others v Baptiste and Others* (No. 2) [1999] 55 WIR 404, PC.

[989] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[990] *Roodal v The State of Trinidad and Tobago,* [2004] 2 WLR 652, PC.

[991] *Boodram and Others v Baptiste and Others* (No. 2) [1999]55 WIR 404, PC.

[992] *Matthew v The State of Trinidad and Tobago* [2005] 1 AC 433, PC.

[993] Roscoe Pound, 'The Theory of Judicial Decision. III. A Theory of Judicial Decision for Today' (1923) 8 (36) Harvard Law Review 940 - 959 at 956 indicates that: ("Judicial declaration of law, on the other hand, prescribes a rule with reference to and as a measure for a situation or transaction of the past and, as a precedent, is to be applied to past and future alike.").

In a comparative analysis in the case *Chambers v. Florida,* Justice Hugo Black in United States Supreme Court said "*[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, out-numbered, or because they are . . . victims of prejudice and public excitement."*[994] In essence this statement demonstrates that Supreme Court plays a very important political role in the United States' constitutional system of government by ensuring that each branch of government recognizes the limits of its own power.

In addition, such an idea was also presented by *Posner* who indicates that judges have been occasional legislators through the process of exercise discretion.[995] By exercising discretion, judges through the courts, bring about reform of the justice system. This thereby affords protection of civil rights and liberties by striking down laws or acts that violate the Constitution. The point to note is that it is evident that the Privy Council is an occasional legislator like ministries of government and secretaries of assemblies. It is also part of the institutional structure of governments within the Commonwealth Caribbean. One of its major characteristics as illustrated by *Shapiro* is that it produces public policy decisions which keep the Constitution and the death penalty law for murder in harmony with social progress.[996]

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[994] *Chambers v. Florida*, 309 U.S. 227 (1940) 241.

[995] Richard A. Posner, How Judges Think (Harvard University Press Cambridge Massachusetts 2008) 1-15 at 5 said: ("Our judges have and exercise discretion. Especially if they are appellate judges, even intermediate ones, they are occasional legislators.").

[996] Martin Shapiro, 'Political Jurisprudence' (1964) 52 Kentucky Law Journal 294 – 345 at 297 well illustrates this societal attribute when he said: ("Judges take their places with the commissioners, congressmen, bureaucrats, city councilmen, and technicians who make the political decisions of

In this regard through social policy, the law is inescapably shaped by the Privy Council. As seen in the *Pratt's* case[997] it has judicially directed the administration of the death penalty in the region when it stated that: *"In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment."*[998] Thus, from the analysis and evaluation pursued in this research it was objectively determined that the Privy Council through judicial politics provides key law making functions for the Commonwealth Caribbean society.

7.2: Impact of the institutional approach of Judicial Politics on the Constitutionality of the Death Penalty

Developing social policy. The major impact of the institutional approach of judicial politics on the constitutionality of the death penalty is the development of social policy for the Commonwealth Caribbean society. The reality is that the Privy Council is an integral aspect of governmental activity that impacts socially within the Commonwealth Caribbean society. *Dahl* concluded that the court is inevitably a policy making institution. To that effect he suggested that the court is in a stronger position to influence national policy by pursuing an independent course of action.[999]

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government. In short, the attempt is to intellectually integrate the judicial system into the matrix of government and politics in which it actually operates and to examine courts and judges as participants in the political process, rather than presenting law, with a capital L, as an independent area of substantive knowledge. Quite fundamentally, political jurisprudence subordinates the study of law, in the sense of a concrete and independent system of prescriptive statements, to the study of men, in this instance those men who fulfil their political functions by the creation, application and interpretation of law.").

[997] *Pratt and Another v Attorney General for Jamaica and Another* [1993] 43 WIR 340, PC 362.

[998] *Ibid.*

[999] Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy Maker' (1957) 6 (Fall) Journal of Public Law 279 – 295.

This therefore means that identification of the six categories of cruelty and the manner of addressing them reflect the development of social policy with regard to the death penalty for the Commonwealth Caribbean society by the Privy Council. (See Table 5.1). It was *Friendly* who said that the courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative.[1000]

Friendly suggested that the plainest example for the development of social policy is evident in cruel and unusual punishment clause. This is because the concept of cruelty is not static but must continually be re-examined and reassessed in the light of the evolving standards of decency that mark the progress of a maturing society.[1001] Objectively this is in reality an institutional approach of the Privy Council towards the death penalty in the Commonwealth Caribbean. This approach has been denounced in various legal analysis.

For instance, *Fischman and Jacobi* were critical of any analysis that provide too much discretion to judges to choose outcomes according to their policy preferences, or giving too little consideration of the justice meted out to individual parties.[1002] Clearly this approach is the policy preference that afforded the Privy Council the opportunity

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[1000] Edmund Ursin, 'Judicial Lawmaking' (2009) (57) Buffalo Law Review 1267 – 1360 at 1340.

[1001] Edmund Ursin, 'Judicial Lawmaking' (2009) (57) Buffalo Law Review 1267 - 1360 at 1341.

[1002] Joshua B. Fischman and Tonja Jacobi, 'The Second Dimension of the Supreme' (2016) 57 William and Mary Law Review 1673 – 1715 at 1713.

to define the death penalty in the region as cruel owing to the failure of evolving standard of decency within the region's justice system.

7.3: Impact of the attitudinal approach of Judicial Politics on the Constitutionality of the Death Penalty

Judicial creativity. It is worth noting that judicial politics makes decisions more reasonable in terms of social necessity which is relevant to the demand of public sentiment. This impact of judicial politics was well described by *Tamanaha* who said that through the declaration, construction, interpretation, and application of the law, judges play an important role in the creation and implementation of public policy.[1003]

In addition, *Steinman* in a constitutional article said that Judges make law in a number of different ways such as a court's issuance of a final judgment which is itself a legal decree.[*1004*] This was demonstrated in the data presented in Table 5.1 in Chapter Five of this research. Moreover, this research also demonstrates that such judicial innovation is necessary to address the changing conditions and values of the death penalty. This is in reality the judicial acceptance of the enterprise liability theory which suggest that Courts have a creative job to do when they find that a rule has lost

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[1003] Brian Z. Tamanaha, 'The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" is not Partisanship' (2012) 61 (759) Emory Law Journal 768 said: ("Politics can also be commonly understood as a process (any process) that produces public-policy decisions. Through the declaration, construction, interpretation, and application of the law, judges play a role in the creation and implementation of public policy.").

[1004] Adam N. Steinman, 'A Constitution for Judicial Lawmaking' (2004) 65 University of Pittsburgh Law Review 545 – 596 at 552 said: ("Judges make law in a number of different ways. In the most conventional sense, a court's issuance of a final judgment is itself a legal decree. It is a legally binding document, which the prevailing party may seek to have enforced by a variety of measures.").

its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.[1005]

The development of the six concepts of cruelty by the justices of the Privy Council exhibits a negative impact by creating limitations thereby restricting the implementation of the death penalty. Naturally this is credible evidence of judicial creativity and more specifically the application of the enterprise liability theory by the justices of the Privy Council. In this qualitative research evaluation and analysis of the ideological approach of the justices of the Privy Council a clear pattern of inconsistency has been demonstrated by the justices of this judicial institution in treating with the issues concerning the constitutionality of the death penalty. In essence, it can be said that the justices of the Privy Council through the interpretation of the constitutional provisions have developed on the issue of cruelty surrounding the death penalty.

In addition, the attitudinal approach of the justices of the Privy Council on the issue of cruelty has been both glorified and criticised in varying sectors. For instance, *Mendes* has described the attitudinal approach of the justices of the Privy Council in

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[1005] Edmund Ursin, 'Judicial Lawmaking' (2009) (57) Buffalo Law Review 1267 – 1360 at 1309 Traynor presents this theory by suggesting that: ("Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. Their role is to engage in a "pragmatic search for solutions" and then to "hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will meet those tests." In short, courts "can and should participate creatively in the development of the common law.").

death penalty cases as the creation of exceptions for the most exceptional punishment.[1006]

This representation is presented in the first paragraph of the research on *'saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness'* in which he glorified the creation of those judicial exceptions. He indicated that the death penalty challenges the administration of justice and constantly calls into question its most basic assumptions which tested the creativity of lawyers who search for even more ingenious ways to keep the hangman at bay. This he said provokes the judiciary into exploring the uttermost reaches of the legal system.[1007]

This position is a clear validation of the presence of the research concept of judicial politics in the Privy Council's decisions on the constitutionality of the death penalty. It is also an expression of the Privy Council's justices' liberal stance where it was demonstrated that they decide matters in accordance with the attitudinal model approach.

[1006] Douglas Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission Foreign and Commonwealth Office 2005) 41 – 52 at 41.

[1007] Douglas Mendes, *Saving lives by luck and chance: Saving Law Clauses and the persistence of arbitrariness* (European Commission Foreign and Commonwealth Office 2005) 41 – 52 at 41 indicated that: ("More than any other issue, the death penalty challenges the administration of justice and constantly calls into question its most basic assumptions. It tests the creativity of lawyers who search for ever more ingenious ways to keep the hangman at bay. It provokes the judiciary into exploring the uttermost reaches of the legal system to press into service forgotten, never before developed or fledging principles and remedies to make the administration of the death penalty, while it lasts, fairer and more humane to the extent that this is possible. Death penalty litigation is all about the creation of exceptions for the most exceptional punishment. To this end, the judiciary has shown itself prepared to reverse itself, at times in most dramatic fashion.").

However, unlike *Mendes* position Lord Bingham in the *Reyes* case[1008] was critical of the attitudinal model approach by the justices of the Privy Council. He basically said that the court has no licence to read its own predilections and moral values into the Constitution.[1009] This statement although an expressed confirmation of the judicial behaviour by the Privy Council justices' it also suggests that Lord Bingham was more in favour of the legal and the institutional model approaches than the judicial innovation in the liberal attitudinal model approach.

In a similar vein, Lord Hoffman denounced the attitudinal model approach of creativity by some of the justices of the Privy Council in the *Lewis* case.[1010] He made an interesting statement in a dissenting judgment in the said *Lewis* case[1011] which also showed support for both the legal and institutional approaches. In that case he described the attitudinal approach of the Privy Council justices in death penalty cases as an exhibition of a doctrinal disposition to come out differently.[1012]

The approach of the Privy Council in death penalty cases can be validated and confirmed in terms of the researcher's analytic model of judicial politics. This has

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[1008] *Reyes v The Queen* [2002] 2 AC 235, PC.

[1009] *Reyes v The Queen* [2002] 2 AC 235, PC 246.

[1010] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[1011] *Ibid.*

[1012] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC Lord Hoffman denounced the attitudinal model approach by saying: ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently,' the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

been achieved through the alteration of principles and practices by the court to promote its judicial preferences on national policy. To compliment this issue *Rubin* and *Feeley* writing on judicial policy making and litigation against the government said that the courts' involvement in establishing correctional policy must be seen as part of the broader trend to establish national norms for the administration of criminal justice.[1013]

In this regard, these expressions by the Privy Council are in reality the judicial condemnations of the death penalty which are indicative of the use of judicial politics to create national policy. This concept is reflective of the sort of judicial behaviour of having to use or using shrewd awareness of what is expedient, advantageous or artful to restrict the use of the death penalty in the region. In this research such is demonstrated through the doctrinal – politics paradigm of attitudinal approach of judges of the Privy Council.

The impact of the attitudinal model approach of judicial politics is that it negatively affects the constitutionality of the death penalty in the Commonwealth Caribbean. Thus, whether the judicial doctrinal approach by the Privy Council is deemed creativity as suggested by *Mendes* or whether it is the imposition of its own predilections and moral value, as stated by Lord Bingham in the *Reyes* case,[1014] or

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[1013] Edward L. Rubin and Malcolm M. Feeley, 'Judicial Policy Making and Litigation Against the Government' (2003) Journal of Constitutional Law 617 – 664 at 660.

[1014] Reyes *v The Queen* [2002] 2 AC 235, PC 246.

whether it is an exhibition of doctrinal disposition to come out differently as identified by Lord Hoffman in the *Lewis* case,[1015] or whether it is considered in light of the analytic models of judicial politics as described, analysed and evaluated herein, its major impact has been that the operationalisation of the doctrinal judicial politics obscures the *Beccaria's* theory of society perspectives.[1016] That is to say it negates the theoretical perspective which suggests that punishment must be a certainty, inflicted quickly, and it should not be administered to set example neither should it be concerned with reforming the offender.[1017]

It is quite obvious that the judicial innovation of the six concepts of cruelty of the death penalty created by the Privy Council validate the research analytical theoretical perspective. A major impact is that judicial politics operates counter to another of *Beccaria's* theoretical perspective which suggests that the complete criminal law code should be written and all offences and punishment should be defined in advance.[1018] In addition, judicial politics impacts on punishment which should be decided by the legislature and not by the court.[1019] To put it simply the judicial creativity is a form of

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[1015] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC.

[1016] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[1017] Ibid.

[1018] Ibid.

[1019] Ibid.

judicial innovation that is synonymous to judicial politics and it impacts negatively on Cesare Beccaria's theory of society perspectives.[1020]

Another impact has been the damaging of the rule of law on the death penalty in the Commonwealth Caribbean and this has the effect of destabilising the administration of justice in the region. The Privy Council in *Reyes v. The Queen*[1021] acknowledged this by saying that the ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted and this would result in the prevention of crime.[1022]

It seems from the assessment of the approaches of the Privy Council in death penalty cases that the ordinary task of the courts as illustrated in *Reyes* case is not achieved. It is quite evident from that statement that to a large extent the problems associated with the crimes that this region is experiencing should be placed on the doorstep of the Privy Council.

That institution failed to give effect to the political will of the democratically-elected legislature in the Commonwealth Caribbean states. Its members on a given occasion have exhibited judicial politics by coming out against established principles on the

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[1020] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning Belmont California 2004) 30.

[1021] *Reyes v. The Queen,* [2002] 2 AC 235, PC said: ("The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted.").

[1022] *Ibid.*

death penalty. This has caused damage to the death penalty rule of law while effectively destabilising the administration of justice in the Commonwealth Caribbean. This type of activity was condemned by Sir William Blackstone and documented in the first volume of his book the Commentaries when he said that law, without equity, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion.[1023]

7.4: Correlation between Judicial Politics and the Constitutionality of the Death Penalty

Public Policy impact. The main objective of this research is to understand the extent to which the Privy Council decision making on the constitutionality of the death penalty in the Commonwealth Caribbean's influenced by judicial politics. This research finds significant evidence in support of the correlation between judicial politics and the death penalty in the decision making by the justices of the Privy Council. An examination of the data will illustrate that they hinge on the public policy of the Commonwealth Caribbean society. *Pacelle Jr.* and *Pyle* in their research on public policy indicated that Justices construct public policy through the precedents that come from individual decisions.[1024]

[1023] William Blackstone, Commentaries on the Laws of England 6 (1765) at 62 commented that: ("The liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, [though] hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.").

[1024] Richard L. Pacelle Jr. and Barry W. Pyle, *Issue Emergence and Evolution in the U.S. Supreme Court, Open Judicial Politics* (edited by Rorie Spill-Solberg, Eric Wattenburg, and Jennifer Segal). (Corvallis: Oregon State University Press 2020) 527 – 548 at 527 – 528 indicated that: ("Justices construct public policy through the precedents that come from individual decisions. Those decisions are pieced together into doctrine. Doctrine results from the ongoing conversation that happens among

In addition, the data presented in this research demonstrates that the Privy Council decisions on the death penalty, influence public policy in the Commonwealth Caribbean and drastically alter and or in some instances shape the policy landscape in the region. The result of *Cahill-O'Callaghan* research on judicial decision making demonstrated that same is influenced by matters other than the evidence and arguments presented in the court.[1025] This present research illustrates a solution of public policy justice by the Privy Council in its decision-making on the constitutionality of the death penalty in the Commonwealth Caribbean.

In the fifth edition of the book on '*Social Research Methods'* it has been stated by *Neuman* that qualitative researchers look at the sequence of events and pay attention to what happens.[1026] It is with this description in mind that a qualitative analysis has been undertaken in order to validate and confirm the reality of the research hypothesis. Interestingly, the said literature also indicates that qualitative researchers can look for

litigants, courts, and interest groups that defines the terms of debate about the constitutionality or legality of an issue. It is important to understand the roots of doctrine. The basis for new cases will affect how that issue area will unfold. It also helps explain why precedents seldom get overturned.").

[1025] Rachel Cahill-O'Callaghan, *The Influence of Personal Values on Legal Judgments* (Cardiff University 2015) 333 indicated that: ("despite the external and internal constraints imposed by judicial procedure and the judicial oath, judicial decision making is influenced by matters other than the evidence and arguments presented in the court.").

[1026] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 148 said: ("Qualitative researchers look at the sequence of events and pay attention to what happens first, second, third, and so on. Because qualitative researchers examine the same case or set of cases over time, they can see an issue evolve, a conflict emerge, or a social relationship develop. The researcher can detect process and causal relations.").

patterns or relationships, but they begin analysis early in a research project, while they are still collecting data.[1027]

It therefore stands to reason, that, this exercise of qualitative analysis of the research variable commences with the background study of the death penalty problem. This includes a statement of the problem with regard to the death penalty which is documented in Chapter One. Based on the revelation in the background study the literature review was pursued and documented in Chapter Two. From the stand point of the review of literature it was confirmed that there is no known literature in the region which is directly relevant to the concept of judicial politics. This has made any meaningful comparative analysis of the research impossible. However, there is illustrative evidence from the content research method pursued in the literature review which validate the researcher's analytic model of judicial politics.

In view of this a qualitative methodology was designed in Chapter Three. This was followed with a legal case study of the death penalty in the Commonwealth Caribbean which was documented in Chapter Four. In that chapter secondary data was obtained and presented on the death penalty in the Commonwealth Caribbean. The data demonstrated a lack of execution in the region and such inactivity is synonymous with delay in execution.

[1027] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003) 440.

In chapter five there was the presentation of a legal and textual analysis on illustrative information of pattern of behaviour on the concept of judicial politics.[1028] Most of the data evaluated from the qualitative research method have demonstrated to some degree that the Privy Council influence on judicial politics has an impact on the Commonwealth Caribbean's efforts to carry out the death penalty.

This was based on the interpretation of the terms inhuman and cruel. Thus, the objective assessment seems to suggest that although the death penalty is lawful for persons convicted of murder in this region, the Privy Council has restricted its implementation. Thus, the mere restriction of the implementation of the death penalty by the Privy Council would be a qualitative measure of confirmation for the specific hypothesis. Accordingly *Garoupa* said in this regard that judicial decision-making in a constitutional court is inclusive of ideological preferences.[1029]

That measure of confirmation can also be gleaned from the analysis of the statement made at the Public Consultations on Crime held in 2007 in the Republic of Trinidad and Tobago by Mr. Patrick Manning the then Prime Minister. In response to a question on the government's policy on the implementation of the death penalty in the

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[1028] William Lawrence Neuman, *Social Research Methods Qualitative and Quantitative Approaches* (5th edn. Boston Press New York 2003).

[1029] Nuno Garoupa, 'Empirical Legal Studies and Constitutional Courts' (2014) Indian Journal of Constitutional Law 26 – 54 at 29 said: ("Whatever model prevails, judicial decision-making in a constitutional court, as in any court, is the result of personal attributes, attitudes (including policy or ideological preferences), peer pressure, intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court), and party politics (loyalty to the appointer) within a given constitutional and doctrinal environment.").

Republic of Trinidad and Tobago the then Prime Minister said that our inability to carry it out stems largely from the position adopted by the Privy Council.[1030]

The reality is that this expression presents sensitizing concepts and understanding of the death penalty in the Republic of Trinidad and Tobago. Foremost within this statement is the criticism of the attitudinal approach adopted by the Privy Council which inhibits the carrying out of the death penalty. In reality it supports as credible the notion of the Privy Council that judicial politics restricts the region's propensity to carrying out the death penalty. Moreover, this statement presents illustrative evidence which is consistent with the Privy Council, departs from following the binding authority of judicial precedents and focuses on its institutional role of overruling the precedents.

The evaluation of judicial politics in Chapter Five presents the judicial perspective of the Privy Council which complimented the public perspective. In the first instance it illustrated what was suggested by *Cairns* in his article that the Judicial Committee laboured under two fundamental weaknesses, the legal doctrine which ostensibly

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[1030] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79 Mr. Patrick Manning, the then Prime Minister, indicated that: ("Capital punishment; that has been the subject of a lot of discussions in Trinidad and Tobago, and our inability to carry it out stems largely from the position adopted by the Privy Council. It has been particularly accentuated with the advent of Britain to the European Union and the attitude of the European Union to this whole question of capital punishment. The law lords in London, the Judicial Committee of the Privy Council which, as you know, is the highest court for Trinidad and Tobago, are taking the position that they put one impediment after the next in the way of the execution of capital punishment in this country.").

guided its deliberations, and its isolation from the setting to which those deliberations referred.[1031]

Whereas in the latter case it was discovered that the Privy Council itself through its own members confessed that it was involved in dismantling the death penalty in the region. The leading statement on this issue came from Lord Hoffman in the *Lewis* case. He admonished the members for their doctrinal disposition to come out differently.[1032] In addition, Lord Bingham in the *Reyes* case, was critical of the attitudinal approach of the Privy Council when he said that the court has no licence to read its own predilections and moral values into the constitution.[1033]

Relying on these statements alone there is a clear confirmation of judicial politics at the level of the Privy Council. In this regard *Young* in his writing on the death penalty said that when the justices are engaging in constitutional interpretation, their rulings significantly influence the jurisprudence of the Commonwealth Caribbean states and this raises the spectre of policy making by the court.[1034] The objective reflection which

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[1031] Alan C. Cairns, 'The Judicial Committee and Its Critics' (1971) (iv) 3 Canadian Journal of Political Science 301 – 345 at 327.

[1032] *Lewis et al v Attorney General of Jamaica and another* [2001] 2 AC 50, PC. Lord Hoffman said: ("If the board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently,' the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.").

[1033] Reyes *v The Queen* [2002] 2 AC 235, PC 246.

[1034] Harold Young, 'The Death Penalty: The Law Lords Alter Course in the Commonwealth Caribbean' (2019) 10 (2) Journal of International and Global Studies 64 – 85 at 80 said: ("When the Law Lords engage in constitutional interpretation, their rulings significantly influence the jurisprudence of the Commonwealth Caribbean states. With the use of the death penalty in the spotlight of human rights advocates, the debate about the legality regarding international law and usefulness in deterring crime

can be deduced from the content of these assertions is that it not only validates the concept illustrated in the research theory as plausible or credible, but it provides a measure of confirmation that the hypothesis of the specific research is reliable.

This scientific principle of objectivity which was used to assess the data, presents the realistic portrait of judicial politics as a means of explaining the constitutionality of the death penalty in the Commonwealth Caribbean. This attitude of the Privy Council was also highlighted by *Morrison* who said that one highly unusual feature of the decisions of the Privy Council on death penalty cases from the Commonwealth Caribbean is that it has felt able to explicitly reverse its own previous decisions on at least three occasions.[1035]

In this regard *Morrison* not only recognised unusual feature of decision making by the Privy Council but he identified with the changing norms of that institution through decision making.[1036] It therefore means that this idea clearly supported the validation of the research analytic model that judicial politics in the Privy Council decision

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continues. As their rulings are not subject to review by any other court, it raises the specter of policy making by the court.").

[1035] Dennis Morrison, 'Caribbean Legal Affairs: The Judicial Committee of the Privy Council and The Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism' (2006) 30 Nova Law Review 403 at 441 said: ("one highly unusual feature of the decisions of the Privy Council on death penalty cases from the Commonwealth Caribbean over the past twenty-five to thirty years is that it has felt able to explicitly reverse its own previous decisions on at least three occasions, a phenomenon which represents a recognition of the ferment of changing norms in the arena of international human rights, and no less of changing times.").

[1036] Ibid.

making negatively affects the constitutionality of the death penalty in the Commonwealth Caribbean.

In 2016, the Cornell University Law School through its Death Penalty Worldwide research and advocacy centre indicated that in many countries, the path to abolition of the death penalty begins by a restriction on the application of capital punishment. In that regard it indicated that the judiciary and the legal profession lay the groundwork for the abolition of the death penalty by developing a culture that emphasizes the overriding value of fundamental rights. It is clear that the judicial decisions by courts may prepare for legal reform by chipping away at allowable death penalty practices.[1037]

Thus, by analogy to the suggestion made by Cornell University Law School, the pattern of decision making on the issue of cruelty illustrated in this research is a definite validation of the research theoretical concept of judicial politics and the confirmation of the research hypothesis. Therefore, the illustrative data unearthed in this research have provided strong evidence that the ideological preferences of the justices have frequently influenced their decisions. Thus the research analysis and evaluation of the said data herein have made the case that:

- The constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics in the Privy Council.

[1037] Cornell University Law School, *Pathways to Abolition of the Death Penalty* (Swiss Federal Department of Foreign Affairs, 2016) 1 – 38 at 33.

Writing on the subject of death penalty *Mitchell* considers such aspect of decision making by the Supreme Court to be troubling. In so doing he indicated that the most troubling aspect of the Supreme Court's regulation of death penalty has been its failure to persuasively explain why the Court's judgments surrounding its use should prevail over the decisions made by the political branches.[1038]

It was against this background that *Davila* in her article on replacing the Privy Council with the Caribbean Court of Justice presented a clear position in addressing the concept of judicial politics which permeated the Privy Council's judgements. She suggested that it would be in the best interest of all Caribbean nations, to join in and create a Caribbean Court of Justice that will lead these nations to strengthen their democratic institution.[1039]

It was realised in this research that the Privy Council has developed on an ad hoc basis, reacting in a practical and principled way to the changing needs and standards. Interestingly in his writing on the Privy Council, *Lord Neuberger* seemingly captured this research perspective when he said that the Privy Council is a full-fledged appellate

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[1038] Jonathan F. Mitchell, 'Death Penalty Commentary Series Capital Punishment and the Courts' (2017) 130 Harvard Law Review Forum 269 -275 at 274.

[1039] Isabel C. Davila, *Replacing the Privy Council with the Caribbean Court of Justice in the OECS Countries*." (The Emerging Caribbean: Direction and Purpose for the 21* Century Caribbean Studies Association 1998) 1- 19 at 15 indicated that: ("The Privy Council may have been a useful institution during the colonial era. However, due to the changes that both Europe and the Caribbean have undergone its presence in the jurisdiction of the Caribbean is part of the colonial legacy of the last century. It would be in the best interest of all Caribbean nations, including those in the Organization of Eastern Caribbean states to join in and create a Caribbean Court of Justice that will lead these nations to strengthen their democratic institution, develop economically, socially and politically in addition to achieving a higher level of justice.").

court and serves to support and develop the rule of law with a unique international character.[1040]

7.5: Responses to the Research Question

Research analysis and findings. In this research the main issue explored was whether in light of both the majority and minority decisions of the Privy Council in the *Riley* case and the subsequent ruling in the *Pratt* case, which adopted and embraced the said minority or dissenting decision in the *Riley* case, the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics. It is worth noting that from the case law study of secondary data and the legal and textual document review, the researcher was able to conduct a qualitative analysis of the constitutionality of death penalty in the Commonwealth Caribbean in an attempt to respond to the research issues. The analysis resulted in validating as credible that there is judicial politics in the Privy Council decisions on the constitutionality of death penalty in the Commonwealth Caribbean.

In addition, those research methods were able to gather illustrative information which aided in the validation and confirmation of the research hypothesis. Within this measure of confirmation, the researcher was able to arrive at the main conclusion.

[1040] Lord Neuberger, The Judicial Committee of The Privy Council In The 21st Century (2014) (3)1 Cambridge Journal of International and Comparative Law 30–57 at 57 said: ("It [Privy Council] is an appellate court which serves to support and develop the rule of law. While the JCPC's reach is far less than it was at the height of the Empire, in many ways, it has strengthened itself over the past century, through modernising its functions, so that today it is a fully-fledged appellate court, with a unique international character.").

That is the concept of judicial politics has a causal negative effect on the constitutionality of the death penalty in the Commonwealth Caribbean region.

Judicial Politics. This is the obvious conclusion to be deduced from the analysis pursued on the jurisprudential approach of the Privy Council to the constitutionality of the death penalty. Thus, there was a measure of confirmation of the research hypothesis which indicates that the constitutionality of the death penalty in the Commonwealth Caribbean is influenced by and correlated to judicial politics. The doctrinal-politics of the Privy Council resulted in the creation of categories of cruelty which are exceptions for the death penalty and contains expressions of judicial politics.

Paradigm of cruelty. The presence of judicial politics in the constitutionality of the death penalty has been expressed by the Privy Council through its attitudinal approach as it sought to interpret and define the term "inhuman or cruel" in the Commonwealth Caribbean States, Constitutions. The Privy Council's expression of "inhuman or cruel" resulted in the creation of six forms of judicial exceptions for the death penalty. Moreover, this paradigm has been the set of inflection of judicial politics that render implementation of the death penalty unconstitutional. In reality such a paradigm has demonstrated that the judicial reasoning of the Privy Council impacts in the following manner:

i. A restrictive approach for the death penalty in the region through the ignoring of precedents and its exhibition of a liberal stance to decide matters according to judicial preferences and or ideologies.

ii. Developing on the issue of cruelty in the death penalty from the constitutional principle:

a. inhuman or degrading treatment or punishment in the Constitution of Jamaica and the Eastern Caribbean States.

b. cruel and unusual treatment or punishment in the Constitution of the Republic of Trinidad and Tobago.

iii. Describing cruelty of the death penalty in terms of:

a. Delay of execution.

b. Swiftness of execution.

c. Mandatory death sentence.

d. Prison conditions.

e. Ministerial advice prior to execution.

f. Opinions of international human rights bodies.

The development of those issues by the Privy Council demonstrates the concept of judicial politics in its decisions on the constitutionality of the death penalty.

7.6: A Criminal Justice Explanation of the Death Penalty

Overall research conclusion. The main purpose of this research was to conduct a contemporary legal analysis of judicial politics in the Privy Council in order to further understand and explain the death penalty in the Commonwealth Caribbean. The exploratory research pursued on the death penalty in this region has unearthed significant data and illustrative information which when collated and analysed present a criminal justice understanding and explanation of it. The true rationale of the *Pratt* principle and the importance and purpose of this research has been the recognition that

judicial decision making is an important area of study as it speaks of the concept of judicial politics as the component that influence the Privy Council decisions on the constitutionality of death penalty in the Commonwealth Caribbean.

Critical in this research was the revelation that between the pronouncement of the death penalty and its implementation there is a gap. Lying within that gap is an environmental determinant of the death penalty. This environmental determinant is the judiciary and in particular to this study, the Privy Council as the judicial institution along with the justices of that institution that exhibit judicial politics. This phenomenon of judicial politics in effect is the judicial condemnation of the death penalty on the basis of inhumanity or cruelty owing to the lack of decency to humanity. It is this lack of decency to humanity that has been the stimulus that is responsible for the application, implementation or consequences of the death penalty for persons convicted of murder in the Commonwealth Caribbean.

7.7: Implications of the Death Penalty Research

The cumulative effect of the research theory and the research findings can provide the basis for policy makers to reform the justice system in the region in keeping with the modern standard and decency within the society. In reality, this research with its findings is sufficiently adequate to afford the addressing of the public policy issues concerning the way murderers are punished. Primarily, it should now be decided whether in light of the validation of judicial politics as an environment variable negatively affecting the constitutionality of the death penalty, the region is prepared to continue with this form of punishment. Therefore, it is now up to the policy makers

to apply this report as a crucial catalyst for eliciting change within the region's justice system.

7.8: Recommendations

This research exploration has successfully achieved the research aim and goals. In essence there was the evaluation of the decision-making of the Privy Council on the issue of the constitutionality of the death penalty in the Commonwealth Caribbean in order to explain the patterns of judicial politics in terms of the legal model approach, the institutional model approach and the attitudinal model approach. During this exploration other issues related to the death penalty are unearthed. These are the spiralling murder rate in the region and the real effectiveness of the death penalty, both of which engulfed the region's justice system.

This will require exploration to provide a further understanding of the effectiveness of the death penalty within the criminal justice in the region. One suggestion would be to facilitate an exploratory research on the significance of the death penalty as the punishment for the crime of murder within the region's justice system. The need for this is presented in the researcher's personal statement and the ideal for the reformation of punishment.

Researcher's personal statement. As this researcher concludes this exploration, it is submitted that the validation of the research theory and the measure of confirmation of the research hypothesis are evidence that the research goals have been achieved in this investigation. However, the research challenges experienced during the

immersion into some of the illustrative information in this exploration have been troubling. For instance, *Vollum, Mallicoat and Buffington-Vollum* writing on the death penalty said that: *"Capital punishment remains a political and emotional hot button and polarizing point of debate as one of the de jour controversial issues in the realm of criminal justice and politics."*[1041] In addition, *Harrington* in her writing the mandatory death penalty in the Commonwealth Caribbean indicated that: *"The death penalty is a subject that … invariably elicits passionate comment. Such comment is particularly so within the states that make up the Commonwealth Caribbean, where rising rates of violent crime have led to strong public clamour for a swift and final response."*[1042]

The immersion into these and other texts has forced this researcher to heed *Beccaria's* request when in 1764 he published his essay *'On Crimes and Punishments'* calling for a rethinking of the prevailing concepts of law and justice.[1043] Having done so this researcher has made a personal reflection on the death penalty as the punishment for persons convicted of murder in the Commonwealth Caribbean and it has led him to surmise that - the merits of having the death penalty as the punishment for the crime of murder is truly a complex social phenomenon with widespread shifting of morals and the expression of social, political and human rights concerns.

[1041]Scott Vollum, Stacy Mallicoat and Jacqueline Buffington-Vollum, 'Death Penalty Attitudes in an Increasingly Critical Climate: Value- Expressive Support and Attitude Mutability' (2009) 5 (3) The Southwest Journal of Criminal Justice 221 – 242 at 222.

[1042] Joanna Harrington, 'The Challenge To the mandatory Death Penalty in the Commonwealth Caribbean' (2011) 98 (126) The American Journal of International Law 125 – 140 at 126.

[1043] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004) 29.

Reformation of punishment. This research exploration has demonstrated that there is a definite need for the reformation of the law on murder and the death penalty as the punishment that is associated with such a crime in the region. Of practical importance is that from the research pursued there seems to be no credibility in the statement made in 2007 by Mr. Patrick Manning the then Prime Minister of Trinidad and Tobago who said in part that Trinidad and Tobago's inability to carry out the death penalty stems largely from the position adopted by the Privy Council.[1044] What was borne out of this research was that the Privy Council was merely doing what the legislators in Trinidad and Tobago and the rest of the region have failed to do.

In an Amnesty International journal article on the death penalty in the English-Speaking Caribbean, *Hanna* Jr. said that the death penalty is really a dangerous weapon to be left in the hands of the legal system.[1045] Owing to this, it is really the inherent role of the Privy Council to keep the death penalty law in the Commonwealth Caribbean region in tandem with social progress as public sentiment demands.

[1044] Republic of Trinidad and Tobago, *Public Consultations on Crime in Trinidad and Tobago* (Ministry of the National Security Trinidad 2007) 79 Mr. Patrick Manning the then Prime Minister of Trinidad and Tobago said: ("Capital punishment; that has been the subject of a lot of discussion in Trinidad and Tobago, and our inability to carry it out stems largely from the position adopted by the Privy Council. It has been particularly accentuated with the advent of Britain to the European Union and the attitude of the European Union to this whole question of capital punishment. The law lords in London, the Judicial Committee of the Privy Council which, as you know, is the highest court for Trinidad and Tobago, are taking the position that they put one impediment after the next in the way of the execution of capital punishment in this country.").

[1045] Amnesty International Secretariat, 'Death Penalty in the English-Speaking Caribbean A Human Rights Issue' (Amnesty International publications 2012) 15.

Another important ideology taken from a statement made by a former President of the United States of America, Thomas Jefferson, portrays the reality of the death penalty in terms of the attitudinal model or the liberal approach of the Privy Council. This ideology can be found chiselled in stone at the Jefferson Memorial in Washington D.C. It was stated by the author that he was certainly not an advocate for frequent changes in the laws and the constitutions however, laws and constitutions must go hand in hand with the progress of the human mind.[1046]

This idea clearly encapsulates the researcher's personal statement and the research recommendation. It also illustrates the justification for the Privy Council's attitudinal approach towards the death penalty. Moreover, it naturally supports the aspect of *Beccaria* theoretical perspective which illustrates a rallying call for a rethinking of the way persons are punished.[1047]

It is my sincere hope that the research analytic model of judicial politics at the level of the Privy Council would generate a deeper understanding for the judicial behaviour of this institution towards the constitutionality of the death penalty in the Commonwealth Caribbean. It should also specifically support the notion for a

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[1046] John D. Bessler, 'Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty and the Abolitionist Movement' (2009) 4 (2) Northwestern Journal of Law and Social Policy 195 said: ("I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.").

[1047] Liqun Cao, *Major Criminological Theories* (Wadworth/Thompson Learning 2004) 29.

rethinking of how convicted murderers are punished in the Commonwealth Caribbean and in general how other convicts are punished. In this regard *Gangrade* put it quite succinctly when he said that the law is an instrument of social change which should be altered from time to time to suit the changing social circumstances.[1048]

In the Republic of Trinidad and Tobago the law prohibiting the crime of murders is contrary to the common law which interestingly was developed sometime around 1602 by Lord Coke. Naturally this law speaks to the antiquity of the authority prohibiting such a crime that carries the death penalty as its punishment. In this regard *Bessler* said that although the use of death sentences and executions was once seen as a lawful sanction, that antiquated societal norm should be replaced by a new norm as an international law standard prohibiting the death penalty under all circumstances as part of the existing *jus cogens* norm barring torture.[1049]

In addition, *Gangrade* made it quite clear that law is an instrument of social change and it must keep pace with a progressive modern society and that living in the present times is a more complicated process than what it was in the times of our forefathers.[1050]

[1048] K. D. Gangrade, 'Legal Research and Methodology' (2001) Journal of the Indian Law Institute 273 – 300 at 273 indicated that ("Law is an instrument of social change. It must keep pace with a progressive modern society. Living in the present times is a more complicated process than what it was in the times of our forefathers. The problems of today cannot be solved by the methods or tools known to them. These will have to be altered from time to time to suit the changing social circumstances.").

[1049] John D. Bessler, 'The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions' (2018) 79 (7) Montana Law Review 8 – 48 at 47.

[1050] K. D. Gangrade, 'Legal Research and Methodology' (2001) Journal of the Indian Law Institute 273 – 300 at 273.

In furtherance of this, it is my earnest desire that the law on murder and the death penalty as a punishment for murder within the criminal justice system in the Commonwealth Caribbean society should be re-evaluated. This is necessary to reform the antiquated law on murder and also to determine the relevance of the death penalty in today's Commonwealth Caribbean society. Such re-evaluation will also satisfy *Bessler's* notion that laws and institutions must go hand in hand with the progress of the human mind.[1051]

[1051] John D. Besler, 'Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty and the Abolitionist Movement' (2009) 4 (2) Northwestern Journal of Law and Social Policy 195.

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